SUPREME COURT OF THE UNITED STATES

No. ~~181~~ 103.

JOHN O'BRIEN, PLAINTIFF IN ERROR,

vs.

ELIZA M. PERRY AND AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

G. S. GIDEON, Printer, 511 Ninth street, Washington.

1157

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THE STATE OF MISSOURI, *ss.*

Be it remembered, that on the 23d day of August, 1858, there was filed in the office of the clerk of the supreme court of the State of Missouri, held at St. Louis, a transcript of the record and proceeding in a certain cause, in words and figures as follows, to wit:

STATE OF MISSOURI,
Washington County.

Be it remembered, that on the 4th day of May, 1855, John O'Brien filed his petition in the office of the clerk of the circuit court of said county against the heirs of John Perry, which petition is in the words and figures following, to wit:

Petition.

Washington County, Mo., May Term Circuit Court, A. D. 1855.

JOHN O'BRIEN, Plaintiff,
against
ELIZA M. PERRY, EDWARD BREDELL, ANGELINE C. BREDELL, Stephen J. Dunklin, Rachel E. Dunklin, Sarah A. Perry, John Wiatt, Eliza M. Perry, William E. Brown, Robert H. Browne, and Joseph T. Browne, infants, and William M. Small, Defendants.

Plaintiff states, that on the 4th day of May, A. D. 1854, he was legally entitled to the possession of the east fractional half of the southeast fractional quarter of fractional section fifteen, in township thirty-seven north, of range two east, containing fifty-eight acres and fifty-four hundredths of an acre of land, situate in the county of Washington, in the State of Missouri; and being so entitled to the possession thereof, the said defendants afterwards, to wit, on the day and year aforesaid, wrongfully entered into said land, and now unlawfully withholds from the plaintiff the possession thereof, to his damage twenty dollars. Plaintiff asks judgment for the possession of said premises, and the damages specified.

JNO. W. NOELL
And J. G. BEAL,
Att'ys for Pl'ff.

Thomas O. Hanlen, agent for John O'Brien, being duly sworn, states: He believes the above petition and the matters therein, as stated, are true.

Sworn to and subscribed before me, this 2d May, A. D. 1855.
THOS. O. HANLON.
W. A. MATTHEWS, *Cl'k.*
By SAM'L HARRISON, *D. C.*

Appearance of Def'ts entered.

Upon the back of which appears the following endorsement: Defendants admit themselves in possession of the premises within described, and enter their appearance in the suit without process.
SCOTT, YOUNG & FRISSELL,
Att'ys for Defendant.

Answer.

And afterwards, on the 5th day of May, 1855, the following order was made in said cause, to wit:

Now at this day, come the defendants, by their attorneys, and entered their appearance in this cause, and continued, and afterwards, on the 29th day of April, 1856, the defendants file their answer, which is as follows, to wit:

JOHN O'BRIEN, Plaintiff,
against
ELIZA M. PERRY, EDWARD BREDELL
and others, Defendants.

Defendants come and say, that the said plaintiff ought not to have or maintain his aforesaid action against them, nor have the prayer of his petition granted, because the said plaintiff was not legally entitled to the possession of the tract of land in the petition mentioned, on the said 4th day of May, 1854, nor upon any other day or time since said date, nor have the said defendants, or either of them, wrongfully entered upon said lands; nor did they, or either of them, on the day alleged, nor any time since, unlawfully withhold from the plaintiff the possession of the premises, but the said defendants hold, and since the 26th day of November, 1839, have held, a just title to the lands in the petition mentioned, and since the year 1795 to said last date, they and those under whom they claim have held possession of said premises under a claim of right, having its inception under the laws and customs of Spain, and recognised by the government of the United States, after the cession of Louisiana to the United States. Defendants say, that Bazil Valle inhabited and cultivated, from about the year 1795 to the 18th day of March, 1806, a tract of land in and adjoining the present village of Mine a Breton, of which tract the land in the plaintiff's petition mentioned forms a part; that, at the date last aforesaid, the said Bazil Valle sold and conveyed his said claim, by virtue of inhabitation and cultivation, to John Perry, senior; remained in possession of said land, cultivating and living upon the

same until the 16th day of January, 1819, when he sold, conveyed and delivered the possession of said land to his sons, William and John Perry. Said William and John Perry resided upon said land and cultivated portions of it, jointly, till the death of William Perry. John Perry, shortly after that event, acquired the rights of William Perry's heirs, and became the sole owners thereof, and inhabited and cultivated said land till the time of his death; after about the year 1838 or '9, he resided a portion of his time in St. Louis, and for some few years before his death he considered that city his home; that said John Perry, senior, gave notice to the recorder of land titles for the Territory of Louisiana, on the 3d day of October, 1807, of their claim under said Bazil Valle, to six hundred and thirty-nine acres of land, according to the law of the United States, and subsequently filed the deed of the Bazil Valle, *at* [as] evidence of his title, and offered other evidence before the board for the adjustment of land claims in the then Territory of Louisiana, which claim, by surveys subsequently made, included the land in the petition mentioned, [and] described as the southeast fractional quarter of fractional section fifteen, township thirty-seven north, range two east.

The house occupied by said Bazil Valle was near the Mine a Breton creek, and the same place has been occupied by the owners of said claim as a place of residence, without interruption, from 1795 to 1836 or 1837; different persons have, however, at different times intruded upon parts of said claim, and among them the ancestor of the plaintiff so intruded.

On the 5th of December, 1811, the said John Perry, sen., offered evidence to establish his claim to the board for the final adjustment of land claims for the Territory of Louisiana, and on the 27th of December, of that year, the said claim was rejected by a majority of said board, on or about the 2d of December, 1820; notice of said claim was filed with the register and receiver at the land office at Jackson, Missouri, and said claim reserved from sale, and, as an evidence of its reservation, the land embraced within the claim was surrounded by dotted lines, according to the practice of that office. On the 16th day of July, 1825, William and John Perry, claiming under Bazil Valle, had conferred to them, under the act of Congress of June 13th, 1812, and the supplement thereto of the 26th of May, 1824, by the recorder of land titles in St. Louis, a town lot and an out-lot of the village of Mine a Briton, upon which town lot the dwelling-house of said Valle had been, and of said John Perry then was situated. Said lot had a front of 206 feet on the present Jefferson street of that village, now called Potosi, by 250 feet back, and the out-lot is two arpents front by seven in depth, and adjoins the town lot on the back part; these two lots are within the lines of the original survey of the claim of John Perry, under Bazil Valle, made by John Stewart, about the year

1806. The act of Congress approved July 9th, 1832, and of March 2d, 1833, provided that actual settlers, being housekeepers, upon such as are rejected claimants, or such as may waive their grant (donation) in Missouri, shall have the right of pre-emption to enter within the time of the existence of this act, not exceeding the quantity of their claim, which in no case shall exceed the quantity of six hundred and forty acres, to include their improvements; who shall give notice of their right of pre-emption, and in all things to the regulations as have been or may be prescribed by the Secretary of the Treasury, under the existing laws relative to pre-emption, and it shall be the duty of the Secretary of the Treasury immediately to forward to the several land offices in said State the manner in which all those who may wish to waive their grants or claims, and avail themselves of the right of pre-emption, shall renounce or release their said grants (or donation rights) under the act of July 9th, 1832. The board organized in the latter part of August or the first of September, 1832, and continued their organization for two years, according to the provisions of the act of Congress, and on the 7th day of August, 1834, the said John Perry, and Eliza, his wife, according the instructions issued by the Secretary of the Treasury, under the provisions of said act, relinquished and conveyed to the United States their claim to the donation of said tract of land held by virtue of the settlement and cultivation of said Bazil Valle, which conveyance included the town and out-lot above mentioned, confirmed to them under Bazil Valle. The said claim of John Perry was neither confirmed nor rejected by said board, under the act of July 9th, 1832, and was reserved from sale under said act for the purpose of enabling said Perry to enter said land under its provisions.

The above-mentioned conveyance of John Perry and wife to the United States was duly recorded in the office of the recorder of land titles.

That after making said conveyance, and about the first of September, 1834, the said John Perry applied at the land office at Jackson, Missouri, to enter the claim so relinquished, but was not allowed to enter the same, for the reason that the surveys adjoining his proposed entry had not been completed, and the officers of said land office had no knowledge of the quantity of land contained in the various fractional sections which embraced the claim. After the completion of said surveys in June, 1836, he made a second application to enter the land, both times tendering the money, but was informed by the land officers that the law by which the right to enter had accrued had expired, and was refused permission to enter; from which decision of the register and receiver at Jackson said Perry appealed to the Commissioner of the General Land Office, who, under date of September 28th, 1839, ordered that Perry be allowed to enter said claim, under act of July 9th, 1832, pro-

vided said officers should be satisfied that he was entitled to the benefit of the law under which he claimed, and in pursuance of which order, on the 26th of November, 1839, said Perry was permitted to enter, he having made proof, to the satisfaction of the register and receiver, that he inhabited and cultivated the land claimed on account of the plat of the surveys furnished by the surveyor general to said officers, not showing the quantity of land contained in the lot and out-lot above mentioned, which had been confirmed to Wm. and John Perry, under Bazil Valle; he was not permitted to enter said lots, which included his house and other buildings, and a portion of his cultivated land, said lot, as above stated, being included in his conveyance to the United States; said plat at the land office did not show the United States land, but said two lots above mentioned, which belonged to the United States, was laid down upon said plat as private property; the land thus entered included the land in controversy—the permitting the said Perry to enter the land above mentioned. The United States complied with their proposition to Perry, made in the law above recited, provided he would relinquish his claims to the land claimed under Bazil Valle before the board of commissioners had acted upon his claim. Defendants further state, that the said claim of John Perry, under Bazil Valle, was reserved from sale under the act of July 9th, 1832, and the reservation has not been removed; and it is still reserved from sale, except for the purpose of being entered by John Perry, or his legal representatives, by reason of his relinquishing his right under act of July 9th, 1832, in said claim to the United States.

The title under which plaintiff claims possession had its inception subsequent to said last-mentioned act, and is consequently void, as having emanated contrary to law.

FRISSELL & GANTT,
Att'ys for Def'ts.

M. Frissell, attorney for def't, makes oath and says, that the foregoing answer and the matters therein as stated, he believes to be true.

M. FRISSEL.

Sworn to before , April 29th, 1856.
W. A. MATTHEWS, *Clerk.*

Death of Sam'l N. Perry suggested.

And afterwards, at the April term, 1856, the following order was made in said cause, to wit:

Death of Sam'l N. Perry suggested, and sci. fa. awarded against the widow and heirs of said deceased; whereupon said *scira* facias issued, which is as follows, to wit:

Sci. Fa.

WASHINGTON COUNTY, *sct.*

The State of Missouri to the Sheriff of said county, greeting:

We command you, that you summons Ann Perry, Lucy Perry, and Samuel N. Perry, that they be and appear before the judge of our circuit court, at a court to be held at the court-house in the town of Potosi, in and for said county, on the last Monday of April next, then and there to show cause, if any they can, why they should not be made parties defendant in a certain cause now pending and undetermined in our said court, wherein John O'Bryan is plaintiff, and Eliza M. Perry, and other heirs of John Perry, dec'd, are defendants, and have you then and there this writ.

Witness William A. Matthews, clerk *clerk* of our said court, at office, this 4th day of February, 1857.

WM. A. MATTHEWS, *Clerk.*

Served the within summons on Ann Perry, Lucy Perry, and Samuel N. Perry, by reading the writ in each of their presence and hearing in Washington Co.

M. A. TODD, *Sheriff.*

Cause submitted.

And said cause was regularly continued until the 8th day of May, being May term of said court, 1858, when the following appears of record, to wit:

Now at this day come the parties, by their attorneys, and all and singular the premises being by them submitted to the court, and the evidence not being concluded, court adjourned till Monday morning, 8 o'clock.

Judgment.

MONDAY, *May 10th*, 1858.

The following order appears of record in said order, to wit:

Now at this day come again the parties, by their respective attorneys, and the trial of the cause is again resumed, and the evidence being now concluded, and the cause being argued by counsel on both sides, and mature deliberation being thereupon had by the court, the court finds the issue for the defendants; therefore it is considered by the court that the defendants recover of the said plaintiff their costs in this behalf expended, and that they have thereof their writ of execution.

Bill of Exceptions.

And at the same term, being the eighteenth day of May, 1858, the plaintiff filed his bill of exceptions, which is in the words and figures following, to wit:

In the Circuit Court of Washington Co.—May Term, 1858.

JOHN O'BRIEN
against
THE HEIRS OF JOHN PERRY.

Be it remembered, that on the trial of the above cause before the court, without a jury, the plaintiff gave the following evidence, to wit:

Proof of Pre-emption.

The plaintiff read the proof of his right of pre-emption taken before the register and receiver of the land office at Jackson, together with the duplicate receipt and certificate of entry, as follows, to wit:

JACKSON, MISSOURI, *August 29th*, 1846.

I, John O'Brien, claiming the right of pre-emption under the provisions of the act of Congress entitled An act to appropriate the proceeds of the sales of the public lands and to grant pre-emption rights, approved September the 4th, 1841, to the E. fr'l ½ S. E. fr'l ¼ fr'l section fifteen, township 37 north, of range No. 2 east, containing $58\frac{54}{100}$ acres, in the district of lands subject to sale at Jackson, Missouri, solemnly swear that I have never had the benefit of any right of pre-emption under this act; that I am not the owner of three hundred and twenty acres of land in any State or Territory of the United States, nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit, and that I have not directly nor indirectly made any agreement or contract in any way or manner with any person or persons whatsoever, by which the title which I may acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except myself.

JOHN O'BRIEN.

I, Franklin Cannon, register of the land office at Jackson, Missouri, do hereby certify that the above affidavit was taken and subscribed before me, this 3d day of July, A. D. 1847.

FRANKLIN CANNON.

Testimony in the case of John O'Brien, claiming the right of pre-emption, under the provisions of the act the 4th September, 1841, to the E. fr'l ½ S. E. fr'l ¼ fr'l section 15, T. 37 north, range 2 E., containing $58\frac{54}{100}$ acres, in the district of land subject to sale at Jackson, Missouri.

Patrick Carrigan, of lawful age, being duly sworn, deposeth and saith that he, deponent, hath knowledge, that on the ninth day of

April last the said John O'Brien did commence building a dwelling-house on said above described land; on the 30th June last, deponent saw said claimant occupying said house; in it he had household furniture, &c., beds, chairs, and other articles; said house is 12 or 13 feet square, made of round logs, one story high, pine-plank floor, chimney, door, one glass window covered well with slabs; besides said house, claimant had on said land eight acres cleared, under good fence, and cultivated in corn and oats; said claimant continued to occupy said house until he started to the land office to enter said land.

Question. Is the said John O'Brien a citizen of the United States?

Answer. He is; I have known him to vote.

Question. Is he the head of a family?

Answer. He is a young man over the age of twenty-one years.

Quest. Did he quit or abandon land of his own in this State to settle on said claimant's land?

Ans. He did not; he owns no land in the State.

Quest. Is there any other person either residing upon or cultivating any portion of said land, except the said John O'Brien?

Ans. There is not.

Quest. Does he own land either in this State, or any other State or Territory of the United States?

Ans. He does not.

Further this deponent saith not.

PATRICK CARRIGAN.

Sworn to and subscribed before the undersigned, clerk of the circuit court within and for the county of Cape Girardeau, in the State of Missouri, this the 3d day of July, A. D. 1847.

[L. S.] ROB'T BROWN, *Clerk.*

Andrew O'Brien, of lawful age, being duly sworn, deposeth and saith: That the deponent has knowledge that the said John O'Brien, on or about the ninth day of April, 1847, did commence building a house on said above described land, and that said claimant finished said house, and now occupies it as a dwelling-house; deponent was in said house on the last day of June last, and saw in it household furniture, beds, chairs, and table; said house is upwards of 12 feet square, constructed of pine logs covered with slabs, floor of pine plank, door, chimney, and one glass window, one story high, well chinked; besides said house, claimant has on said land some ten or eleven acres cleared and fenced, and now cultivated in corn, oats, potatoes, and clover; said claimant has been laboring on said land from the 9th of April last up to the day he started to the office to enter the same.

Quest. Is he, the said John O'Brien, a citizen of the United States?

Ans. He is.

Quest. Is he a single or married man?

Ans. He is a single man, and over the age of twenty-one years.

Quest. How much land does he own in this State, or in any other State or Territory of the United States?

Ans. He is not the owner of any land in the United States, and did not move from land of his own.

Quest. Is there any other person either residing upon or cultivating any portion of said land, except the said John O'Brien?

Ans. There is no one, except the said John O'Brien.

Further this deponent saith not.

ANDREW O'BRIEN.

Sworn to and subscribed before the undersigned, clerk of the Cape Girardeau county circuit court, State of Missouri, this, the 3d day of July, 1847.

ROBT. BROWN, *Clerk.* [L. S.]

No. 10,319. RECEIVER'S OFFICE AT JACKSON, MISSOURI, *July* 3*d*, 1847.

Received from John O'Brien, of Washington county, Missouri, the sum of seventy-three dollars and seventeen and ½ cents, being in full for the east fractional half southeast fractional quarter of frl. section No. fifteen, in township No. thirty-seven north, of range No. two east, containing fifty-eight acres and fifty-four hundredths, at $1 25 per acre. $73 17½. Silver $73 17½.

(Original prem. act 1841.)

AARON SNIDER, *Receiver.*

No. 10,319. LAND OFFICE AT JACKSON, MISSOURI, *July* 3*d*, 1847.

It is hereby certified that, in pursuance of law, John O'Brien, of Washington county, State of Missouri, on this day purchased of the register of this office the lot or east frl. half southeast frl. quarter of frl. section No. fifteen, in township No. thirty-seven north, of range No. 2 east, containing fifty-eight and fifty-four hundredths acres, at the rate of one dollar and twenty-five cents per acre, amounting to seventy-three dollars and seventeen ½ cents, for which the said John O'Brien has made payment in full as required by law.

Now, therefore, be it known, that on presentation of this certificate to the Commissioner of the General Land Office, the said John O'Brien shall be entitled to receive a patent for the lot above described.

(Prem. act 1841.)

FRANKLIN CANNON, *Register.*

GENERAL LAND OFFICE,
July 18*th*, 1857.

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the annexed 13 pages are true and literal exemplifications from the originals on file in this office.

In testimony whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

THOS. A. HENDRICKS,
Commissioner of the General Land Office.

Patent.

The plaintiff then read his patent from the government as follows, to wit:

The United States of America to all to whom these presents shall come, greeting:

Certificate No. 10,319.

Whereas John O'Brien, of Washington county, Missouri, has deposited in the General Land Office of the United States a certificate of the register of the land office at Jackson, whereby it appears that full payment has been made by the said John O'Brien, according to the provisions of the act of Congress of the 24th of April, 1820, entitled An act making further provisions for the sale of the public lands for the east fractional half of the southeast fractional quarter of fractional section fifteen, in township thirty-seven north, of range two east, in the district of land subject to sale at Jackson, Missouri, containing fifty-eight acres and fifty-four hundredths of an acre, according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, which said tract has been purchased by the said John O'Brien: Now know ye, that the United States of America, in consideration of the premises and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said John O'Brien, and to his heirs, the said tract above described: to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging, unto the said John O'Brien, and to his heirs and assigns forever.

In testimony whereof, I, Franklin Pierce, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the fourth day of May, in the year of our Lord one thousand eight hundred

and fifty-four, and of the independence of the United States the seventy-eighth.

By the President: FRANKLIN PIERCE.

By JOHN H. WHEELER,
Ass. Secretary.

J. N. GRANGER,
Recorder of the General Land Office.

Recorded vol. 30, page 117, E.

The plaintiff then closed his evidence in chief.

The defendants then offered to read the notice of claim, the proceedings of the different boards of commissioners, with the deed of Bazil Valle to John Perry, sen., and John Perry's deed of relinquishment, dated in 1834, all on one certified transcript, of which the following is a copy, to wit:

Proceedings of Board of Commissioners and deed from Bazil Valle to Jno. Perry.

To the Recorder of Land Titles for the Territory of Louisiana:

SIR: Be pleased to take notice that the underwritten claims, as assignee of Bazil Valle, six hundred and thirty-nine acres of land, situate at Mine a Breton, in pursuance of the inhabitation and cultivation made on the said land by the said Valle, conformably to the laws of the United States made and provided the claims to land within the Territory of Louisiana and St. Louis, 3d October, 1807.

JOHN PERRY.

Know all men by these presents, that I, Bazil Valle, of the Mine a Breton, district of St. Genevieve, hath bargained and sold to John Perry, of said Mine a Burton, all my right, title, and claim to my settlement at said mines, to include the house in which I now live, together with my garden and the lot of ground heretofore improved by me, supposed to be ten acres, more or less, with an out-house annexed to said tenement, for two hundred and twenty-five dollars in cash, paid by said Perry; the receipt hereof I acknowledge and make over all my right, title, and interest to said lot of ground and improvement to said Perry's heirs, administrators, executors, and assigns, and I do hereby warrant and defend the said lot and improvement from me, my heirs, administrators, executors, and assigns forever.

In witness whereof, I, Bazil Valle, do hereby set my hand and seal, this eighteenth day of March, in the year of our Lord one thousand eight hundred and six.

BAZIL VALLE, his ✕ mark. [SEAL]

Test: W. FENWICK.

December 12*th*, 1806.

This day Bazil Valle appeared before me and acknowledged the above instrument of writing as his acts and deeds for the purpose therein mentioned.

JN. SMITH, *J.*

See Record Book C, p. 497.

December 5*th*, 1807.

The board met agreeable to adjournment.

Present, the Hon. J. B. C. Lucas, Clement B. Penrose, and Frederick Bates.

John Perry, assignee of Bazil Valle, claiming six hundred and thirty-nine acres of land, situate at the Mine au Breton, produces a notice to the record, dated October 3d, 1807, and a deed of conveyance from said Valle to claimant, dated 18th of March, 1806.

Joseph Pratt, being duly sworn, says, that between the years 1792 and 1795, Bazil Valle built a cabin on the claim, cultivated a garden, and cleared six acres of land, in 1796, continued to inhabit and cultivate the same till sold to claimant, and has been inhabited and cultivated ever since, said Valle considering the said tract not to be more extensive than his improvements; that there had been mineral found within two rods of the enclosure, but does not know of any being found on the land that the house stands on, the street of the village at the Mine au Breton.

Adjourned till Monday morning, 9 o'clock.

See board's minutes, No. 3, pages 147, 158, and 161.

JOHN B. C. LUCAS,
CLEMENT B. PENROSE,
FREDERICK BATES.

FRIDAY, *December* 27, 1811.

Board met.

Present, John B. C. Lucas, Clement B. Penrose, Frederick Bates, commissioners.

John Perry, assignee of Bazil Valle, claiming 639 acres of land. See book No. 3, page 158.

It is the opinion of the majority of the board that this claim ought not to be granted because it appears Bazil Valle claims another tract of land under concession.

Frederick Bates, commissioner, forbears giving an opinion.

Board adjourned till Monday next, 9 oclock a. m.

See board's minutes, No. 5, pages 540, 542, and 546.

JOHN B. C. LUCAS,
CLEMENT B. PENROSE,
FREDERICK BATES.

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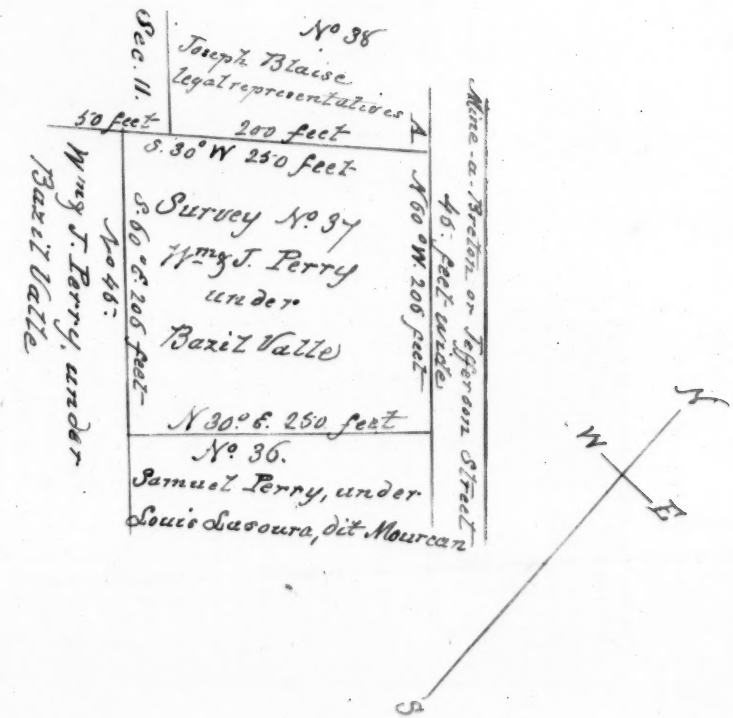

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TUESDAY, *December* 3*d*, 1853.

F. R. Conway, esq., appeared pursuant to adjournment.

Bazil Valle, by his legal representative, John Perry, claiming 639 acres of land, situated at Mine a Breton. See book C, page 497; minutes No. 3, page 158; No. 5, p. 542.

STATE OF MISSOURI,
County of Washington.

John T. McNeal, aged about 70 years, being duly sworn as the *land* directs, deposeth and saith that he was well acquainted with Bazil Valle, the original claimant; that the witness came to this country in the year 1797, and that he found Valle the claimant at the Mine a Breton in the year 1798; that in the year 1798 said Valle was settled and living on the land claimed, had a cabin on the same, and some land cleared, and that the said Valle continued to inhabit and cultivate the same till he sold to Perry, and that the said tract of land has been actually inhabited and cultivated ever since and still is.

So sworn to and subscribed before me, Lewis F. Linn, comm'r, this 8th day of May, 1833.

JOHN T. McNEAL.
Pr. F. LINN, *Commissioner.*

And also came John Steward, who being duly sworn, deposeth and saith, that he is about 60 years old; that he came to this country in the year 1800; that he knew the original claimant, Bazil Valle; that he was settled at that time, 1800, on the land claimed; had several good cabins on the same; had several acres of land cleared and in cultivation, and that he continued to inhabit and cultivate the same till he sold out to John Perry, and that said Perry took possession of the land and continued to inhabit and cultivate the same, and that the tract of land has been actually inhabited and cultivated ever since. And this witness further says that he surveyed the land for the claimant.

Sworn to and subscribed before me, the commissioner, this 10th day of May, 1833.

JOHN STEWART.
L. F. LINN, *Commissioner.*

And also came Uriah Hull, a witness, aged about 56 years, who being duly sworn, deposeth and saith, that he came to the country in the year 1804, and that he found Bazil Valle, the original claimant; that he was settled on the tract of land claimed; had several houses; was a baker; had land cleared and cultivated; that he raised wheat on the place in 1804; that he saw it thrashed out, and that the said tract of land has been actually inhabited and cultivated by the said Bazil Valle, or those claiming under

him, ever since, and from the appearance of the place, it had been inhabited and cultivated for some years before.

Sworn to and subscribed before me, the commiss., this 10th day of May, 1833.

URIAH HULL.
L. F. LINN, *Commiss.*

Adjourned till to-morrow, at 9 o'clock a. m.

F. R. CONWAY.

See board's minutes No. 6, pages 356, 357, 358 and 360.

Jno. Perry and Wife—Relinquishment.

Know all men by these presents, that we, John Perry and Eliza M. Perry, his wife, of Washington county and State of Missouri, claiming to hold a certain tract or parcel of land under the following title, to wit: in virtue of an improvement or settlement right, and entered on the book of the recorder of land titles, book C, page 497, on the fourth day of October, one thousand eight hundred and seven, John Perry, assignee of Bazil Valle, and claimed under the laws of Congress, granting donations of land to actual settlers, and the title being vested in us as follows, to wit: Bazil Valle's deed to John Perry, sen., dated eighteenth day of March, one thousand eight hundred and six, and acknowledged before John Smith T., a then acting justice of the peace for the district of St. Genevieve.

John Perry, sen. Bill of sale made to William M. and John Perry, dated sixteenth day of January, one thousand eight hundred and nineteen, and by a deed of release made and executed by the heirs of William M. Perry, dec'd, to John Perry, dated the seventh day of December, one thousand eight hundred and twenty-five, and recorded in Washington county, book B, from page 331 to page 335, on the thirteenth day of March, one thousand eight hundred and twenty-six, said land being situate and lying adjoining the village of Mine a Breton, in the county and State aforesaid, and being bounded as follows, to wit: beginning at a stake on Moses Austin's line, running south fifty-five degrees east, thirty poles to a stake; thence north thirty degrees east, thirty poles to a stake; thence south fifty-five degrees east, thirteen poles to a stake; thence south thirty degrees west, twelve poles to a stake; thence south fifty-five degrees east, twenty-six poles to a small black oak; thence south thirty degrees west, four hundred and forty-six poles to a white oak; thence north fifty-eight degrees west, four hundred and ninety-two poles to a white oak; thence north thirty degrees east, one hundred and seventy-five poles to a black oak on Austin's line; thence running with said Austin's line south fifty-eight degrees east, three hundred and ninety-two poles to a white oak; thence north forty-five degrees east, seventy poles

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to a stake; thence east, forty-six poles to a stake; thence north twenty degrees east, one hundred and seventy poles to the place of beginning—containing six hundred and thirty-nine acres, and stands on the public surveys as follows, to wit: township No. 37, north of the base line, range two east of the fifth principal meridian, and being fractions of the following sections in said township: the southwest fractional quarter of section eleven, the northwest fractional quarter of section No. fourteen, the southwest fractional quarter of section No. fourteen, the northeast fractional quarter of section No. 15, the southeast fractional quarter of section 15th, the southwest fractional quarter of section 15, the northwest fractional quarter section 15, and the southeast fractional quarter section ten,—do hereby, and in consideration of the privilege of pre-emption intended to be conferred on us, the party claiming to hold said tract of land by the provisions of the third section of the act of Congress, approved on the ninth day of July, one thousand eight hundred and thirty-two, entitled An act for the final adjustment of private land claims in Missouri, and the supplementary act thereunto, of March second, 1833, entitled An act supplementary to the act entitled An act for the final adjustment of land claims in Missouri, forever waive, release, renounce, relinquish, and surrender unto the United States of America, all the right, title, interest, and claim which we, the said John Perry and Eliza M. his wife, allege and assert, or believe to have acquired, or had at any time alleged and asserted, or believed to have acquired, unto the tract of land above described.

In witness thereof, we, the said John Perry and Eliza M. Perry his wife, have hereunto set our hands and seals, this seventh day of August, one thousand eight hundred and thirty-four, in presence of—

The word five on the thirty-fifth line from the beginning interlined before signing—witness as the signature of—

JOHN PERRY, JNO. PERRY, [SEAL.]
G. H. MCGUNNEGLE, ELIZA M. PERRY. [SEAL.]
J. C. DINNIES.

STATE OF MISSOURI,
County of St. Louis.

Be it remembered, that on this eighth day of August, in the year of our Lord one thousand eight hundred and thirty-four, before me, Archibald Gamble, clerk of the circuit court for the county of St. Louis, which said court is a court of record, personally appeared John Perry, who is personally known to me to be the person whose name is subscribed to the foregoing deed as having executed the same, and acknowledged the same to be his act and deed, for the purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court at office in the city of St. Louis, the day and year above written.
[L. S.]

ARCHIBALD GAMBLE, *Clerk.*

STATE OF MISSOURI,
Washington County.

Be it remembered, that on the 19th day of August, in the year of our Lord one thousand eight hundred and thirty-four, before me, Isaac McGready, clerk of the circuit court for the county of Washington, which said court is a court of record, personally appeared Eliza M. Perry, who is personally known to me to be the person whose name is subscribed to the foregoing instrument of writing as having executed the same, and acknowledged the same to be her act and deed, for the purposes therein mentioned; she, the said Eliza M., being first made acquainted by me with the contents thereof, and examined separate and apart from her husband whether she executed the said deed, and relinquished her dower to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion or undue influence of her said husband, acknowledged and declared that she executed the said deed, and relinquishes her dower in the lands and tenements therein mentioned, voluntarily, freely, and without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Potosi, the day and year aforesaid.
[L. S.]

ISRAEL McGREADY, *Cl'k.*

See Records, book G, pages 16, 17, and 18.

RECORDER'S OFFICE,
St. Louis, 27 *of October*, 1856.

I certify that the foregoing, on pages 1 to 6, is a full and correct transcript, from the books and records in this office, of the claim of John Perry, assignee of Bazil Valle, to six hundred and thirty-nine acres of land, situate at the Mine au Breton.

ADOLPHE RENARD,
U. S. Recorder of Land Titles in the State of Missouri.

The plaintiff objected to the reading of these documents, but the court overruled the objection and permitted the same to be read, and plaintiff *accepted*. Plaintiff then offered to give in evidence a certified plat, of which the following is a copy, to wit, (which is hereto attached as an exhibit, marked P :)

Exhibit P, attached.

[*For plat see original, p.* 16.]

SURVEYOR'S OFFICE,
St. Louis, Jan'y 15th, 1847.

The above plat of that part of the village of Mine a Breton which lies south of Mine a Breton creek, and west of the N. W. boundary of survey No. 3310, of an out-lot of said village, No. 45, of 14 arpens, confirmed to William and John Perry, under Bazil Vallé, and of frac. sections 10 and 14, the S. W. fractional quarter of sec. 11, and the N. E. fractional quarter of section 15, all in township 37 north of the base line, range 2 east of the 5th principal meridian, is conformable to the field-notes of the survey thereof on file in this office.

F. R. CONWAY,
Surveyor General of Public Lands in the States of Illinois and Missouri.

Frissell's Evidence.

M. Frissell sworn. States that defendants offered to prove by him that he had seen a plat of a survey made by John Stewart, purporting to be made in 1806, of the tract of land claimed by John Perry under the notice filed with the recorder in 1807, and survey was signed by said Stewart in his own handwriting, and that it included the land in controversy. Plaintiff objected to this evidence, but the court overruled the objection, and the witness stated that he had seen the plat of survey as above stated, and that it included the tract of land in controversy, and that it included the town-lot upon which Perry lived; and plaintiff excepted. Witness also stated that he had made diligent search for said plat among John Perry's papers, and could not find it; it was also stated that the store, with the contents, in which Perry kept many papers, was destroyed by fire in 1843. The defendants then offered to read the report of the register and receiver of the land office at Jackson to the Commissioner of the Land Office, upon the claim of John Perry to a pre-emption, which report was dated September, 1842, and duly certified. Plaintiff objected, on the ground that it was incompetent evidence to prove the facts recited in it. But the court overruled the objection, and permitted the said report to be read, as follows:

Report of Register and Receiver to Comm'rs on Perry's Claim.

Report of the register of the land office and the receiver of public moneys for the district of land subject to sale at Jackson, Missouri, in the case of John Perry, claiming the right of pre-emption, under the act of Congress approved July 9th, 1832, and the supplement thereto of the 2d March, 1833, to the S. E. fr'l sect. 10, S. W. fr'l q'r sec. 11, tract sect. 14 and tract sect. 15, in township 37 north, range 2 east, in the district of lands subject to sale at

Jackson, Missouri, which tracts were entered by said John Perry on the 26th day of November, 1839, per certificate No. 7329.

From the documents and testimony in this case, it appears that Bazil Valle conveyed to John Perry, sen'r, by deed bearing date March 18th, 1806, all his right, title, and claim to a settlement at the Mine au Breton, supposed to be ten acres, more or less, to include his house and improvements, upon which settlement right John Perry presented, on the 3d of Oct., 1837, to the board of commissioners, his claim of 639 acres of land, agreeable to a plat of survey he had caused to be made by John Stewart, dated 24th of June, 1836, (herewith, marked B, No. 2,) which claim was on the 27 of December, 1811, by said *bond* of commissioners rejected. That on the 16th day of July, 1825, Wm. and John Perry, claiming under the same settlement right acquired from Bazil Valle, had confirmed to them, under the act of Congress of June 13, 1812, and the supplement thereto of the 26th of May, 1824, by the recorder of land titles at St. Louis, a town-lot and an out-lot of the village of Mine au Breton, which lots are included in the original survey made by Stewart, and upon which town-lot the dwelling-house of said Perry is situated. That on the 2d of December, 1820, notice of the claim of said Perry, together with others, was filed in this office, and the claims marked out as reserved from sale on the plat then on file in the register's office by red-dotted lines, including, what now appears from the corrected plat received from the surveyor general, the village of Mine au Breton. (See diagram herewith, marked E, No. 4.)

That on the 3d day of December, 1833, John Perry, jr., the present claimant, again presented his claim for 639 acres, as assignee of said Bazil Valle, submitted further testimony; but it does not appear that the then board of commissioners made a decision thereon. That on the 7th day of August, 1834, the said Perry, with the intention to avail himself of the pre-emption privilege of the act of Congress approved the 9th of July, 1832, and the supplement thereto of the 2d March, 1833, relinquished to the United States all his right and title to the said claim by metes and bounds, in conformity to the plat of survey made by the said Stewart above referred to. That on or about the 1st day of September, 1834, in pursuance of said relinquishment, said Perry made application to the register of this office to make his entry, but was not permitted to do so, in consequence of the public survey being incomplete, and that soon after the completion of the survey, in the month of June, 1836, he again made application to enter, but was then informed by the land officers that the law by which the right to enter accrued, had expired; from which decision the said Perry then applied to the Commissioner of the General Land Office, who, under date of September 28th, 1839, ordered the entry to be made, provided this office was satisfied that from

the proof submitted he was entitled to the benefits of the law under which he claimed; and, in pursuance of such order, on the 26th day of November, 1839, said Perry was permitted to enter this office, requiring him to make proof of possession, inhabitation, and cultivation of a portion of the land claimed. Perry clearly established the fact that he was an actual housekeeper and cultivator upon the claim of Bazil Valle, as presented by him before the board of commissioners, and that his dwelling-house and field in cultivation are situated upon the claim as surveyed by Stewart in 1806, and as reserved from sale upon the original plat in this office; but upon the corrected plat received from the surveyor general under date 28th May, 1836, the town lot confirmed to Perry, and upon which his house is situated, does not appear at all; and out-lot No. 563 is represented as a confirmed claim. (See diagram herewith, marked F No. 5.) Therefore, as Mr. Perry entered by the corrected plat, he could not enter either the town lot on which his house is situated, nor the out-lot, both of which had been previously confirmed to him. Hence the seeming discrepancy in the testimony. Perry's witnesses testify that he resided upon and cultivated a portion of the land claimed by him as the settlement right of Bazil Valle, and the adverse party testify that he never resided upon any portion of the land he was permitted to enter.

Perry, too, by his deed of relinquishment made by metes and bounds, in conformity to the survey of Stewart, has relinquish*ment* to the United States his whole claim under Bazil Valle, including both lots previously confirmed to him. Therefore, having relinquished in conformity to the survey of Stewart, and entered in conformity to the corrected plat of survey on file in this office, he has now no title to either of the lots upon which the principal part, or perhaps the whole, of his improvements are situated. It also appears from the testimony that a portion of the land entered by Perry he never claimed. This state of facts results from the circumstance of Perry being required to make his entry in conformity to the legal subdivision of the plat on file in this office. The undersigned are of opinion that the act of July the 9th, 1832, and the supplement thereto of March the 2d, 1833, did not contemplate the adjudication of this office upon the validity of the claims derived from the Spanish government, but that "the certified copy of the deed of relinquishment from the recorder should be received as evidence of the claimants' right of pre-emption," and that this office erred in requiring John Perry to make proof of inhabitation and cultivation in order to entitle him to the right of pre-emption, inasmuch as the said act of Congress of the 9th of July, 1832, required such proof only in cases where the claim had been rejected by the board of commissioners constituted by said act.

If the foregoing conclusions are correct, it remains only to inquire whether Perry did make application within the time of the existence of the act.

The supplemental law of the 2d March, 1833, enacts that it shall and may be lawful for the recorder and commissioners to continue to take testimony for and during the term of two years from the date of the act to which this is a supplement, which act is dated July the 9th, 1832. Perry's deed of relinquishment is dated the 7th day of August, 1834. It would therefore appear that Perry's application was not made within two years from the date of the act under which he claims. It appears, however, from the instructions of the Commissioner, dated November the 7th, 1832, that the claimants under said act had a right to enter within two years from the date of the organization of said board, of the date of which organization this office has no evidence, but presume from the action of the recorder in the premises that Perry's application was made within two years from the date of the organization of said board; and therefore that it was made in time to avail himself of the benefits of the said act.

Upon the whole, the undersigned are of opinion that John Perry was entitled to the right of pre-emption under the act of Congress approved the 9th of July, 1832, and the supplement thereto of the 2d March, 1833, and that his entry should not be cancelled. All of which is respectfully submitted.

FRANK J. ALLEN, *Register.*
RALPH GUILD, *Receiver.*

Land Office, Jackson, Mo., September 16th, 1842.

GENERAL LAND OFFICE, SOLICITOR'S BUREAU,
January 21, 1843.

SIR: In compliance with your request, I have examined the claim of John Perry, transmitted from Jackson, Missouri. Mr. Perry claims a patent for lands entered by him at Jackson, as a pre-emption, (entry 7,329,) under the act of Congress passed July 9th, 1832, (Laws and Opinions, p. 1, chap. 439,) and other supplemental acts accompanying this claim. There have been also presented and considered the several claims of Jonathan Namer and others to this tract of land as pre-emption, under the act of June 19, 1834.

Omitting many facts and incidents touching the case of Perry, which in no manner affects its merits, it is to be stated, that John Perry shows himself as having complied with all the requisites of law before the consideration and adjudication of his right as a pre-emptor.

That, as a pre-emptor, he has totally failed to prove that he was ever such a settler and house-keeper on the land claimed by him, as is required by law to be proved.

Here Mr. Perry insists—

1st. That nothing more was necessary for him to show as proof before the land officers of his full right of pre-emption, than the certified copy of his waiver or relinquishment from the record of land titles at St. Louis.

2d. If more were necessary on the ground of settlement, he contends that it has been shown by proof of his personal occupancy of lands which formerly constituted a portion of the present claim, and which, although severed by previous confirmations many years since, are now embraced in his relinquishment.

3. In his affidavit, dated September 13th, 1842, Mr. Perry says that he now abandons the (his) pre-emption resting on residence and house-keeping. To the first of these averments it is to be replied, that the act of July 9th, 1832, in terms the most explicit, declares, that actual settlers being house-keepers upon such lands as are rejected, claiming to hold under such rejected claims, or such as may waive their grant, shall have the right of pre-emption to enter within the existence of this act, not exceeding the quantity of their claim, which in no case shall exceed six hundred and forty acres, to include their improvement, who shall give notice and prove their right of pre-emption, and in all things conform to the regulations as have been or may be prescribed by the Secretary of the Treasury, under the existing laws relative to pre-emption. It is difficult to imagine in what manner a law could have been framed embracing two classes of cases which should have more explicity, provided that all the requisites prescribed should apply to each class. It is true that the phrase, namely, or such as may waive their grants, is severed from the first clause, actual settlers being house-keepers, by the interposition of words relative to rejected claims, but it would have been useless repetition to have repeated that first clause, which most obviously applies to the class of waived claims as well as the rejected; besides, if there were a doubt arising from the structure of the sentence, so far as recited it, it is dispelled by the following matter, which clearly relates to all the cases embraced in the law, where it declares that the lands shall include their improvements, and that the claimants, without distinction, shall in all things conform to the regulations, &c., and move the instructions of Nov. 27, 1832, on this subject. Laws, &c., p. 2, fo. 749, No. 709, declare that the parties applying to enter lands under this act, shall produce proof that they were actual settlers, being house-keepers, at the date of the act upon the lands claimed by them. The law and its spirit, with the instructions, (and these instructions, drawn and published soon after the passage of the act, carry the effect of contemporaneous exposition,) all tend to the same point—that is, proof of settlement. Settlement and occupancy constitute the primary and chief reason for a grant of the ordinary pre-emption right, and these requisites are prescribed for all the cases under this law, in its terms, and with equal strength. Being

so prescribed, they are to be shown somewhere, and the certified copy of relinquishment presented by the applicant from the recorder neither constitutes such proof nor even raises its presumption in the slightest manner.

The copy of relinquishment does no more than to assure the land officers of the right of the party presenting it to perfect his claim by such proof as may be thereafterwards adduced, according to and in fulfilment of the law. It does not prove his right in the least degree, but merely lay the foundation for such proof.

In this case also the general instructions of 1832 were repealed in 1839, requiring proof of settlement, and after the lapse of ten years it would seem that it were now late to change the rule, even supposing it to have admitted of doubt in its inception. To the second averment it may be said that the fact of the occupancy by John Perry, of lands formerly constituting a portion of the present claim, but which have been severed long since by previous confirmation, would seem to raise no question; having once been adjudicated and severed, they cannot, under any rule with which I am familiar, be now introduced for the present purpose, either in his relinquishment or elsewhere. The land officers are imperatively required to exact proof of settlement, not of settlement and housekeeping on other lands, (whether once parcel of these lands or not) but on the lands in their jurisdiction, and necessarily such as remain open for adjudication; and then only, with no design of reproach or sarcasm, it may be said of the lands already and long since confirmed to Perry, and severed from all others, that a reversal of the common rule will apply to them—whatever the law hath put asunder let no man join together. Although Mr. Perry has abandoned the pre-emption, so far as proof of residence and house-keeping are concerned, I have preferred to examine the whole case irrespective of such abandonment.

I have not the remotest doubt, that Mr. Perry has no claim as a pre-emptor under the law first cited. The claim of Jonathan Namer and others, under the law of June 19th, 1834, seem to have merit. By the waiver of Perry all the benefits and privileges of the law of July 9th, 1832, were wholly abandoned and gone, excepting the privilege of pre-emption; in other words, he made his election, as well he might, to take the benefit of the pre-emption privilege, and on this privilege he rested his whole case. The time of his waiver, if during the time prescribed by law, was otherwise immaterial to the rights of the United States or to third persons having made the waiver; and subsequently having failed to establish his pre-emption, the land was disencumbered and open to sale or disposal like any other public lands, from the date of the act of July 9, 1832.

Between Perry and other claimants this construction works no injury, for Perry could only be divested by failure to establish his

pre-emption; and as to the United States, inasmuch as the waiver of Perry was a personal privilege, the suspension and protection from sale would be totally *imparative*, if so preferred by him as it was preferred always, excepting his pre-emption privilege. As before suggested, the time of waiver in any view was and is immaterial; for if made before the 19th of June, 1834, the date, Perry would be concluded under the most ordinary rule, failing his proof of pre-emption; and if made after the 19th of June, failing such proof also, it would, by common construction as to the rights of third persons or the United States, be construed as relating to the 9th of July, 1832, and thence forward. This construction is admissible on common principles, and Perry cannot complain, for it does not reach the merits of his case. He stands or falls on his own merits. I think that Jonathan Narner, and others who claim pre-emption to this tract of land, are entitled, provided their respective proofs show all else fair and regular.

I am, very respectfully, your obd't servant,

CHARLES HOPKINS,
Solicitor.

THOMAS H. BLAKE, Esq.,
Commissioner of the General Land Office.

GENERAL LAND OFFICE,
May 5th, 1843.

SIR: Your letter of the 18th inst., calling my attention to a report made by the land officers at Jackson, Missouri, upon your claim by pre-emption under act of 9th July, 1832, and requesting to know the decision of this office on your case, has been received. The case was submitted to the solicitor of this office for examination, and remaining unattended to, subsequent to his report, on account of the pressing nature and great amount of other duties to which I desired to give my personal attention. I have, however, examined the matter and agree with him in the conclusions adverse to your right to the land entered per certificate 7,329 of the Jackson land office, Missouri, inasmuch as the law of July, 1832, gave the right of pre-emption only to actual settlers, being housekeepers on the land sought to be entered; and it is not only proven that you were not an actual settler and house-keeper on any portion of the land entered by you, but such facts is admitted by yourself, and the validity of your claim contended for, on the ground that the law required claimants under it to be actual settlers and house-keepers, only land embraced by the rejected claims mentioned in the law, and not on lands embraced by a grant, to which the claimant waived his right. The circular of instructions under said act, dated 7th Nov., 1832, prepared under the directions of the Secretary of the Treasury, prescribed, that parties applying

to enter lands under this act should produce proof that they were actual settlers, being house-keepers at the date of the act, upon the lands claimed by them, and that the proof should be made in the manner required by the general tenor of the instructions under the act of 5th of April last, (1832,) respecting pre-emptions, and the law required that the claimants should in all things conform to the regulations as have been or may be prescribed by the Secretary of the Treasury under existing laws relative to pre-emptions. The special instructions heretofore issued in relation to your claim, and upon which it is alleged the allowance thereof was made, did change or alter the general instruction applicable thereto, but required that the only objection, therefore, to the entry should have been the want of the official plats, and in the letter of the 6th of May, 1842, to the regt. and recevr., directing an investigation upon this point, the fact of your being an actual settler and house-keeper on the land claimed is stated as essentially necessary to be shown to entitle you to the right. Instructions to the land officers in relation to this matter in accordance with the decision herein communicated will be given at the earliest possible period.

Respectfully, your obd't servant,

THOS. H. BLAKE,
Commiss.

Mr. JOHN PERRY,
Potosi, Missouri.

GENERAL LAND OFFICE, *Oct.* 24, 1845.

SIR: Agreeably to the request of Mr. John Perry, of the 11th inst., I have reconsidered his claim for certain lands in the Jackson dist., Missouri, under the act of 9th of July, 1832, but am unable to arrive at any other conclusions than those communicated to him in my letter of 5th May last adverse to his claim. This review of his claim also brought under examination the adverse claims of certain persons to portions of the same land by virtue of the pre-emption law of 19th June, 1834, and no reasons are seen to change the decisions heretofore rejecting them, the land being reserved for the private claim of John Perry under Bazil Valle, under the general terms of the acts of 1811 and 1818.

Respectfully, your ob'd't servant,

THOS. H. BLAKE, *Commiss.*

LARKIN DORSEY, Esq.,
Attorney for John Perry, Washington, D. C.

GENERAL LAND OFFICE, *Oct.* 25, 1843.

SIR: I have the honor to enclose herewith the papers in reference to the claim of John Perry, under act of 9th July, 1832, and the adverse claims of others to portions of the same land under the pre-emption law of 19th June, 1834. A decision adverse to the

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right of Mr. Perry was communicated to him in letter of 5th May last, and at his request of the 11th inst., the case was re-examined with a similar result, which was made known to Mr. Dorsey, his attorney, in letter of yesterday; copies of said letters are herewith enclosed. Mr. Dorsey having desired that the papers might be laid before you, they are accordingly referred for such action as may seem to you proper in the premises.

With much respect,
Your ob'd't servant,
THOS. H. BLAKE.

Hon. J. C. SPENCER,
Secretary of the Treasury.

TREASURY DEPARTMENT, *Nov.* 3*d*, 1843.

I concur in the decision of the Commissioner of the Genl. Land Office in this case.

J. C. SPENCER,
Secretary of the Treasury.

GENERAL LAND OFFICE, *Nov.* 3, 1843.

SIR: The papers in your case referred to the Secretary of the Treasury, on the 25th ult., in consequence of the appeal taken from the decision of this office communicated to your attorney in letter of 24 ult., have been returned by that officer, with his concurrence in that decision.

Respectfully, your ob'd't servant,
THOS. H. BLAKE, *Commiss.*

JOHN PERRY, Esq.,
Washington, D. C.

Ex.—E. E. F.,
L. M. J.

GENERAL LAND OFFICE, *Oct.* 31*st*, 1856.

I, Joseph S. Wilson, acting Commissioner of the General Land Office, do hereby certify that the annexed nineteen pages are true and literal exemplifications from the originals and records on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

JAS. S. *NELSON*,
Act'g Commissioner of the General Land Office.

The defendants then offered to read a copy of proof taken of John Perry's right of pre-emption, but the copy offered not being authenticated, was by the court excluded.

And defendants excepted. The following is a copy of the same, to wit:

Evidence of John Perry, claiming pre-emption.

Depositions of witnesses taken in the case of John Perry, claiming the right of pre-emption, under the act of Congress, approved July 9th, 1832, entitled An act for the final adjustment of private land claims in Missouri, to the southwest fractional quarter of section No. 11, northwest fractional quarter of section No. 14, southwest fractional quarter section No. 14, northeast fractional quarter section No. 15, southeast fractional quarter section 15, southwest fractional quarter section 15, northwest fractional quarter section No. 15, and the southeast fract. quarter section No. 10.

John Perry, of lawful age, being duly sworn, deposeth and saith: That the above described tracts of land was the head-right of Bazil Valle, which was sold to John Perry, sen., and by John Perry, sen., sold to Wm. M. and John Perry, jun'r, and by the heirs of Wm. M. Perry relinquished to John Perry, (deponent,) who now claims the right of pre-emption to enter said land under the above stated act; and further, this deponent saith that he resided upon and cultivated a portion of the above described head-right of Bazil Valle, being an actual housekeeper, having his family thereon, from the year 1819 to the year 1835, occupying, possessing, and cultivating the same from year to year, and each and every year from the said year 1819 to the year 1835.

Question. What is the nature and extent of your improvements on the said land?

Answer. The improvements consist of a dwelling-house, barn, out-houses, &c., and from fifteen to twenty-five acres under cultivation.

And further this deponent saith not.

(Signed) JOHN PERRY.

Sworn and subscribed to before me, this 26th day of November, 1839.

PETER R. GARRETT,
Cl'k County Court.
By the deputy, GEO. M. BEATTIE.

Henry D. Tripp, of lawful age, being duly sworn, deposeth and saith, that he, deponent, has resided in the immediate vicinity of the foregoing described tracts of land since the year 1813, and has knowledge of the above named John Perry, whose name is signed to the foregoing affidavit, having inhabited, possessed and cultivated a portion of the said claim of Bazil Valle, residing thereon with his family and cultivating the same from year to year and each and every year from the year 1819 to the year 1835, and that the said improvement is now occupied by a tenant under said John Perry.

Question. In what manner did the said John Perry possess and inhabit the said tract of land, and what is the nature and extent of his improvements thereon?

Answer. As early as the year 1819, the said John Perry was residing thereon with his family, and continued there to reside until the year 1835, cultivating a portion thereof each and every year. There is on the land a good dwelling-house, out-houses, and some twenty to twenty-five acres under cultivation; and further this deponent saith not.

(Signed) HENRY D. TRIPP.

Sworn and subscribed to before me, this 26th day of November, 1839.

PETER R. GARRETT,
Cl'k County Court.
By his deputy, GEO. M. BEATTIE.

It is hereby certified that John Perry, whose name is signed to the foregoing affidavit, is personally known to the undersigned, and that he is a person of reputed veracity, and that his testimony is entitled to full faith and credit; and it is further certified that the undersigned have no reason to doubt the credibility of the above named Henry D. Tripp.

(Signed) FRANK J. ALLEN, *Reg.*
RALPH GUILD, *Rec.*

Land Office, Jackson, Mo., Nov. 30, 1839.

STATE OF MISSOURI,
County of Girardeau, ss.

I, Peter R. Garrett, clerk of the county court within and for the county aforesaid, do certify that George M. Beattie, before whom the foregoing depositions of John Perry and Henry D. Tripp were sworn to, is, and was at the time the same were sworn to, deputy clerk of the county court aforesaid, duly appointed and qualified, according to law, and to all his official acts as such due faith and credit are and ought to be given. I also certify that the foregoing signature purporting to be his [is] genuine.

In testimony whereof I have hereunto set my hand
[SEAL.] and seal, the 26th day of November, A. D. 1839.

(Signed) PETER R. GARRETT, *Cl'k.*

GENERAL LAND OFFICE, *Sept.* 23, 1846.

I, James H. Piper, acting Commissioner of the General Land Office, do hereby certify that the three pages, and part above this certificate of the fourth page, are truly copied from the original depositions on file in this office; being part of the testimony in reference to the pre-emption claim of John Perry, under act of 9th July, 1832; the other part showing clearly that the residence of said Perry was not on any part of the land described in the heading of these depositions, being the tracts claimed by him under said act.

In testimony whereof I have hereunto set my name and caused the seal of said office to be hereunto affixed the day and date last above written.

JAMES H. PIPER,
Acting Commissioner.

And the plaintiff excepted.

The defendant then offered to read a certified abstract from the office of the register of the land office at Jackson, of which the following is a copy, to wit:

Abstract from Jackson, showing date of Perry's Entry.

Date of certificate.	No. of certificate.	Name.	Residence.	Tract purchased.			Quantity.		Rate per acre.		Amount of purchase money.	
				Section or part of.	Township.	Range.	Acres.	100ths.	Dolls.	Cents.	Dolls.	Cents.
1839. November 26, Pre-emption act, 9th July, 1832. Cancelled.—See Commissioner's letter of 4th Nov., 1843.	7,329	John Perry	St. Louis.	S. E. fr'l ¼ 10. S. W. fr'l ¼ 11. Fr'l 14. Fract'l 15.	37 N.	2 E.	573	83	1	25	717	28

LAND OFFICE, JACKSON, MISSOURI,
Feb'y 20th, 1856.

I, Thomas B. English, register of the land office at Jackson, Mo., do hereby certify that the above and foregoing entries and memoranda are correctly copied from the register of certificates granted in pursuance of law to purchasers of the public land at this office, as fully and completely as the same appears of from said register, remaining of record in the office.

Given under my hand the day and year above written.

THOS. B. ENGLISH,
Register.

The plaintiff objected, but the court overruled the objections and permitted the same to be read, and plaintiff excepted. The defendant then offered to read a letter from the Commissioner of the

General Land Office to register and receiver at Jackson, dated September 28, 1839, as follows, to wit:

Letter from Com'r to Reg. and Receiver.

GENERAL LAND OFFICE,
Sept. 28th, 1839.

Gentleman: Since my letter to you of the 14th May last, in relation to the claim of John Perry, under the act of 9th July, 1832, and its supplement of the 27th July, 1834, I have again examined that claim and your letter of 15 April last, and with the following result: You state in your letter of the 15th April last that it is also believed that about the first of September, 1834, Mr. Perry made application to the then register of this office to enter, but was informed by him that the entry could not be made, in consequence of the surveys not being completed. If such application was made, and the requisite proof filed according to law, and the entry not made only because of the want of the requisite survey, I am of opinion he should be allowed to enter the same whenever the surveys are returned to your office enabling him so to do, if you should be satisfied from the proof that he is entitled to the benefit of the law under which he claims.

My letter of the 14th May last to you was written under the erroneous impression that his applications were all made after the 1st October, 1835, (when the law expired,) and that the claimant was of opinion that he was entitled to the entry any time within one year after the plat was received; the report by you of his application in June, 1836, and again at the date of your letter of 15th April, 1839, with the mention of the application of September, 1834, between those two dates, led, in a hasty examination, to the impression that his applications were all subsequent to the expiration of the law.

Respectfully, your ob'd't servant,
JAS. WHITECOMB,
Commiss.

To REGISTER AND RECEIVER,
Jackson, Missouri.

It is hereby certified that the within and foregoing is a full and perfect copy of the letter of the Commissioner of the General Land Office, dated General Land Office, Sept. 28, 1839, in reference to the case of John Perry, assignee of Bazil Valle, under the act of 9th July, 1832, now on file in this office.

Given under my hand at the said office at Jackson, Mo., this 25th day of July, 1846.

FRANKLIN CANNON,
Register.

Plaintiff objected, but the court overruled the objection and permitted the same to be read, and plaintiff excepted. It was admitted that John Perry's residence at the time of his deed of waiver, and before that and down to the time he left this county, was on the town-lot confirmed to him under Bazil Valle in 1825, and that no part of his improvements extended over the line of his confirmation as surveyed, except part of a field which it was proven did extend over lines of the confirmed tract, and on to the tract which he claimed pre-emption. Defendant then read without objection the certificate of Recorder Hunt, and the evidence taken of the claim, and a survey of the tract of two by seven arpents confirmed, as follows:

Certificate of Recorder Hunt and survey of 2 *by* 7 *arpents, and also of town-lot.*

Testimony relating to town and village-lots, out-lots and common field-lots, in, adjoining, or belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa a Robert, Carondelet, St. Genevieve, New Madrid, New Bourbon, Little Prairie, and Mine a Burton, in Missouri, and the village of Arkansas, in the Territory of Arkansas, as directed by an act of Congress, passed May 26, 1824; Theodore Hunt, recorder of land titles. Wm. and Jno. Perry, as deriving title from Bazil Valle, claims a lot in the village of Mine a Burton, containing about two hundred and six feet in front, by about two hundred and fifty feet in depth; produces a deed duly recorded from Bazil Valle to John Perry, sen'r, dated 8th March 1806, and a deed from John Perry, sen'r, to Wm. and John Perry, dated 16th January, 1809, bounded northeast by Mine a Burton or Main street; southeast by lot of Sam'l Perry, under Lasouce; southwest by a lane, separating it from the field-lot of Bazil Valle's legal rep's; and northwest by a lot occupied as a graveyard, and the lot of Blais.

Elias Bates, being duly sworn, says he knows the lot claimed, and prior to and on the twentieth day of December, eighteen hundred and three, this lot was owned and occupied and cultivated by Bazil Valle, who continued to possess and occupy the same until he sold it to John Perry, sen'r.

ELIAS BATES.

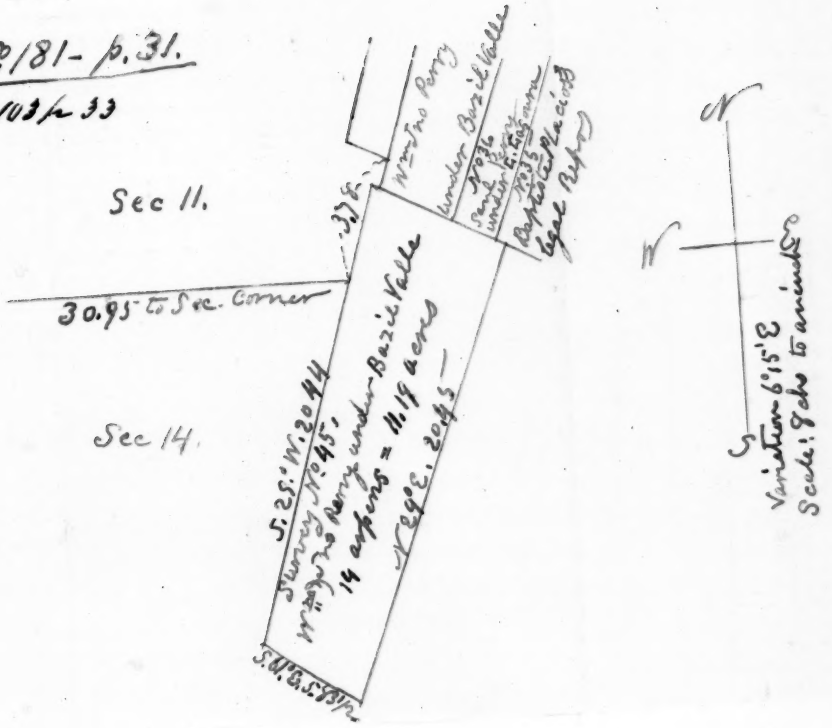
Sworn to before me July 16, 1825.

THEODORE HUNT,
Recorder L. T.

William and John Perry, as deriving title from Bazil Valle, claims an out-lot (produces deed as above) containing about seven arpents in front, by about two arpents in depth on its northwest

No 181 - p. 31.

103 p. 33



end, and about six arpents in front on its southwest side, and about six arpents in depth on its southeast side or end, bounded northeast by the lane separating it from the lot of Wm. and John Perry just proven, and extending back of the lot of Blais, so that a line drawn from the barn of Polite Robert would strike the northwest corner, and the front run so as to be in a line near to Thos. Russ' southwest corner line, southeast by vacant land now claimed by Bazil Valle's legal rep's, southwest by vacant land claimed by Bazil Valle's legal rep's, and northwest by the claim of Bazil Valle's legal representatives, all of which is unconfirmed.

Elias Bates, being duly sworn, says he knows the lot claimed, and that prior to and on the twentieth day of December, eighteen hundred and three, and after this time, this out-lot was owned, fenced in, and cultivated by Bazil Valle, who continued to cultivate the same until he sold it in eighteen hundred and six, to John Perry, sen'r; and furthermore, this deponent further says, to the best of the knowledge of this deponent, it is not mineral land that is included within the limits of this field-lot, as described and proven, and that he, this deponent, never heard of any mineral being raised on or within this field-lot, as bounded and proven.

ELIAS BATES.

Sworn to, before me, July 16, 1825.

THEODORE HUNT,
Recorder L. T.

John Stewart, being duly sworn, says he has read the testimony of Elias Bates, and of his knowledge he believes it to be true in all its parts.

JOHN STEWART.
JOHN STEWART.

Sworn to, before me, July 16th, 1825.

THEODORE HUNT,
Recorder L. T.

RECORDER'S OFFICE,
St. Louis, Missouri, Jan'y 14, 1847.

I do hereby certify the above and foregoing to have been truly transcribed from book No. 1, page 1, and book No. 2, pages 79 and 80, of the testimony taken before Theodore Hunt, recorder of land titles, as the same remains of record in this office.

LOREN SPENCER,
U. S. Recorder of Land Titles in the State of Missouri.

Registry of Certificate of Confirmation on Town-lots, Out-lots, and Common Field-lots issued by the Recorder of Land Titles.

In whose name issued.	No. of cert.	Date.	Situation.	Remarks.	Quantity.	
					Feet front.	Arpens.
Wm. M. and John Perry, deriving title from Bazil Valle.	.....	1825. July 16th.	Adjoining village of Mine a Burton.	Bounded northeast by the same separating it from the lot of Wm. and Jno. Perry just proven, extending back to the lot of Blais, so that a line drawn from the barn of Polite Robert would strike the northwest corner, and the front run so as to be in a line near to Thos. Russe's southwest corner line; southeast by vacant land now claimed by Bazil Valle's legal reps.; southwest by vacant land claimed by Bazil Valle's legal representatives; and northwest by the claim of Bazil Valle's legal representatives; all of which is unconfirmed.	.....	2 arpens by seven deep.

RECORDER'S OFFICE,
St. Louis, Missouri, January 14, 1847.

I do hereby certify the above to have been duly extracted from the registry on file in this office.

LORAN SPENCER,
U. S. Recorder of Land Titles in the State of Missouri.

Survey No. 45.—(Plat 2 by 7 arpens.)

In the village of Mine a Breton. Plat and description of the survey of a tract of land of fourteen arpens, equal to eleven acres and ninety-one hundredths of an acre, situate in township thirty-seven north of the base line, range two east of the fifth principal meridian, in the State of Missouri, executed on the twenty-fifth of July, 1839, by Mason Frissell, deputy surveyor, under instructions from Daniel Dunklin, surveyor of the public lands in the

States of Illinois and Missouri, dated the thirtieth of October, 1837, *the* being the out-lot adjoining the village of Mine a Breton, of two by seven arpents, confirmed to Wm. and John Perry, claiming under Bazil Valle, by the act of Congress of the thirteenth of June, 1812, the extent and boundaries whereof were proven before Theodore Hunt, United States recorder of land titles in the State of Missouri, on the sixteenth day of July, eighteen hundred and twenty-five, in conformity with the provisions of the act of Congress of the 26th of May, 1824, entitled An act supplementary to an act passed on the thirteenth day of June, one thousand eight hundred and twelve, entitled An act making further provisions for settling the claims to land in the Territory of Missouri.

T. 37 N., R. 2 E. of the 5 pr. M.

[*For plat see original, page* 31.]

Description.

Beginning at a stone marked with a cross on the top, the north corner of this survey, and the west corner of lot in the village of Mine a Burton, numbered thirty-seven, confirmed to Wm. and John Perry, claiming under Bazil Valle; thence south 29 degrees west, with the northwest boundary of his survey, at three chains and seventy-eight links intersect the lines between sections eleven and fourteen, thirty chains and ninety-five links east of the corner to section ten, eleven, fourteen and fifteen; at this intersection a stone, marked with a cross on the top, corner to fractional section eleven and fourteen, and at twenty chains and forty-four links a stone fifteen inches long, six inches wide, and five inches thick, the west corner of this survey and a corner to fractional section fourteen; thence south sixty-one degrees east, with the southwest boundary of this survey, at five chains and eighty-three and a half links a stone, marked with a cross on the top, the south corner of this lot, and a corner to fractional section fourteen; thence north twenty-nine degrees east, with the southeast boundary of this survey; at twenty chains and forty-five links a stone, marked with a cross on the top, set in the southwest boundary of lot numbered thirty-five, confirmed to Baptiste Plainde's legal representatives, the east corner of this survey; thence north sixty-one degrees west with the northeast boundary of this survey, and along the southwest boundary of the lot in the village of Mine a Breton, at about sixty-two links the west corner of said lot, numbered 35, and the south corner of lot numbered thirty-six, confirmed to Samuel Perry under Louis Laumore des Moreau; at about two chains and seventy-one links, the west corner of said lot, numbered thirty-six, and the south corner of lot number thirty-seven, and at five chains and eighty-three and a half links the beginning corner.

SURVEYOR'S OFFICE, ST. LOUIS,
April 17, 1847.

Survey number forty-five, in the village of Mine a Breton, has been examined and recorded, and is this day approved.

F. R. CONWAY,
Surveyor of the Public Lands in the States of Illinois and Missouri.

STRVEYOR'S OFFICE, ST. LOUIS,
19*th of April*, 1847.

The foregoing plat and description of survey No. 45, in the village of Mine a Breton, and the certificate of approval thereof, are correctly copied from pages 75 and 76 of the records of surveyor in the said village in this office.

F. R. CONWAY,
Surveyor of the Public Lands in the States of Illinois and Missouri.

Survey of Town Lot.

Defendants also read certificate of recorder and survey of town lot, as follows:

Survey No. 37, in the village of Mine a Burton.

Plat and description of the survey of a lot, situate in the village of Mine a Burton, in township 37, north of the base line, range two east of the fifth principal meridian, in the State of Missouri, executed on the fifteenth of October, eighteen hundred and thirty-five, by Samuel Cole, deputy surveyor, under instructions from Elias T. Langham, surveyor of the public land in the States of Illinois and Missouri, dated in June, eighteen hundred and thirty-five, this being the lot of two hundred and six feet front by two hundred and fifty feet deep, confirmed to William and John Perry, claiming under Bazil Valle, by the act of Congress of the thirteenth of June, eighteen hundred and twelve, the extent and boundaries whereof were proven before Theodore Hunt, United States recorder of land titles in the State of Missouri, on the sixteenth day of July, eighteen hundred and twenty-five, in conformity with the provision of the act of Congress of the twenty-sixth of May, eighteen hundred and twenty-four, entitled An act supplementary to an act *proved* on the thirteenth day of June, one thousand eight hundred and twelve, entitled An act making further provisions for settling the claims to land in the Territory of Missouri.

T. 37 N., R. 2 E., of the 5 p. m.

[*For plat see original, page* 33.]

Description.

Beginning on the southwest edge of Mine a Breton or Jefferson street, at the north corner of this lot, and the east corner of lot num-

ber thirty-eight, confirmed to Joseph Blais' legal representatives, from which the most northern corner of Mr. Perry's shop bears south 30 degrees west, thirteen links distant; at this corner there are three stones set even with the surface of the ground; thence south 30 degrees west with the southeast boundary of said lot numbered 38, and the northwest boundary of this lot at two hundred feet a stone measuring on the top 7 inches square, the south corner of the lot of Joseph Blais' legal representative, from which a crab-apple tree six inches in diameter bears south sixty-seven degrees east thirteen links distant, and at 250 feet a stone marked with a cross on the top, the west corner of this lot, and the north corner of an out-lot numbered 45, confirmed to Wm. and John Perry, under Bazil Valle; thence south sixty degrees east with the northeast boundary of said out-lot numbered 45, and the southwest boundary of this lot at two hundred and six feet a stone eighteen inches long, six inches wide, four inches thick, the south corner of this lot, and the west corner of lot number 36, confirmed to Samuel Perry under Laair Lavource dit Moreau, from which the northeast corner of John Perry's stable bears south thirty-eight degrees east, 93 links distant; thence north 30 degrees east with the northwest boundary of said lot numbered 36, and the southeast boundary of this lot at two hundred and fifty feet a cedar post set in the southwest edge of Mine a Breton street, the east corner of this post, and the north corner of Samuel Perry's said lot, from which the northeast corner of Samuel Perry's dwelling-house bears south thirty degrees west, 17 links distant; thence north 60 degrees west with the southwest edge of Mine a Breton street, and the northeast boundary of this lot at 206 feet, the beginning corner.

SURVEYOR'S OFFICE, *St. Louis, April* 17, 1847.

Survey No. 37, in the village of Mine a Breton, has been examined and recorded, as is this day approved.

F. R. CONWAY,
Surveyor of the Public Lands in the States of Illinois and Missouri.

SURVEYOR'S OFFICE, *St. Louis,* 17 *April*, 1847.

The foregoing plat and description of survey number 37, in the village of Mine a Breton, and the certificate of the approval thereof, are correctly copied from pages 61 and 62 of the record of surveys in the said village in this office.

F. R. CONWAY,
Surveyor of the Public Lands in the States of Illinois and Missouri.

Defendants closed their evidence; and thereupon the plaintiff, to rebut, read in evidence the opinion of the Solicitor of the Treasury,

dated February 21st, 1843, with the decision of the Commissioner of the General Land Office, dated May 5th, 1843, and the ratification thereof by the Secretary of the Treasury, dated November 3d, 1843, upon the claim of John Perry for a pre-emption under the act of July 9th, 1832, as follows, to wit, (which is copied on page 16 and following of this transcript.)

Reference to page 16.

Finding of Facts.

The plaintiff here closed, and this was all the evidence in the cause; thereupon the court found the facts as follows, to wit:

In Washington Circuit Court—May Term, 1858.

JOHN O'BRIEN
vs.
THE HEIRS OF JOHN PERRY.

In the above cause the court finds the facts: that John Perry, sen'r, the ancestor and predecessor o. defendants, on the 3d day of October, 1807, gave notice to the recorder of land titles for the Territory of Louisiana, as assignee of Bazil Valle, of his claim for 639 acres of land situate at Mine a Breton, in pursuance of the inhabitation and cultivation of said Bazil Valle prior to the 20th December, 1803, which notice was accompanied by the deed from Bazil Valle, under which he claimed, of which notice and deed the following are copies, to wit:

(Which notice and deed is copied on page 11 and following of this transcript.) That on the 5th day of December, 1807, the claim was presented to the board of commissioners with the evidence to sustain the same, but not acted on by said board; that on the 27 December, 1811, the said claim was again presented to the board of commissioners and rejected, on the ground that it appeared to the board that Bazil Valle claims another tract of land under concession; that on the 16th day of July, 1825, Wm. Perry, John Perry, junior, having then all the title conveyed by Bazil Valle to John Perry, sen'r, applied to Theodore Hunt and obtained a certificate of confirmation under Bazil Valle, the original claimant, pursuant to the act of 13th June, 1812, for a tract of land of two by seven arpens of land, of which certificate the following is a copy, to wit:

Reference, page 11.

(Which is copied on page 30 and following of this transcript.)

On page 30, reference.

And also certificate of confirmation of a town lot of which certificate.

(Which is copied on page 32 and following of this transcript.)

Page 32, reference.

That on the 3d day of December, 1833, Bazil Valle, by his legal representative, John Perry, appeared before the board of commis-

sioners and presented his claim for 639 acres; offered other evidence in support of his claim, but it does not appear to have been acted on by the commissioners. The following is a copy of the proceedings of the board, and of the evidence presented.

Reference, page 11. (Which is copied on page 11 of this transcript, and following.)

That on the 7th day of August, 1834, John Perry executed to the United States a deed of relinquishment, waiving his claim to a confirmation under Bazil Valle.

Reference, page 13. (Which is copied on page 13 of this transcript.)

That John Perry's residence and house where he lived was situated within the boundary lines of the survey of the tract confirmed to him on the 10th July, 1825, as before recited. That John Perry, claiming the right of pre-emption by virtue of his relinquishment and waiver in the deed before recited, was permitted to enter as a pre emptor, at the land office in Jackson, on the 26th day November, 1839, the tract of land in controversy, and which tract was within the boundary lines of the tract of land claimed by Perry and released by him under his deed of waiver. That the entry made by John Perry, as last stated, was cancelled by the Commissioner of the General Land Office on the 5th day of May, 1843, on the ground that Perry's residence and house being on the land confirmed to him, and not on the land he was permitted to enter, he was not entitled to enter said land as a pre-emptor; which decision of the Commissioner was concurred in by the Secretary of the Treasury, on the 3d day of November, 1843. That

Perry's pre-emption. on the 3d day of July, 1847, the plaintiff in this case applied at the land office in Jackson, Missouri, and made proof of his right to a pre-emption on the land described in plaintiff's petition, and was permitted to enter, and did enter the same as a pre-emptor, and received his duplicate receipt for the purchase money; and the said entry was duly certified to the General Land Office at Washington city, as follows:

Reference, page 9. (Which is copied on pages 9 of this transcript.)

That on the 4th day of May, 1854, the land was patented to said John O'Brien by the Government of the United States.

Reference, page 9. (Which is copied on page 9 of this transcript.)

That the defendants are in possession of the land.

The court further find that Franklin Cannon, register, and Ralph Guild, receiver, at the land office in Jackson, made a report to the Commissioner of the General Land Office at Washington city, in relation to the claim of John Perry, as above stated.

Reference, page 16. (Which report is copied on page 16 and following of this transcript.)

It was further found that the town-lot and the fourteen arpent out-lot, and the balance of the 639 acres claimed, were all connected and included in a survey made by one Sewart in 1806 and prior to the confirmation of 1825 of the lot and out-lot above, and declared as conclusions of law the following, to wit:

Conclusions of law.

Thereupon the court states, as a conclusion of law, that Perry, by virtue of his waiver and relinquishment of his claim as above, became entitled to a pre-emption for the land in controversy, and that the cancellation of his certificates of entry was an act contrary to law, and void.

J. H. STONE.

And thereupon gave judgment for the defendants. The plaintiff then applied to the court for a review of its finding of facts and conclusions of law, and now here asks the court to review its finding of facts and conclusions of law, by motion as follows, to wit:

Motion for Review.

Washington Circuit Court—May Term, 1858.

JOHN O'BRIEN
vs.
THE HEIRS OF JOHN PERRY.

The plaintiff moves the court to review its finding of facts and conclusions of law arising on the facts, for the following reasons:

1st. The evidence in the case does not sustain the facts found by the court.

2. The conclusions of law are erroneous in the facts found.

3. Upon the facts found, the plaintiff was entitled to recover the land in controversy.

4. The evidence does not show that Perry ever had any right of pre-emption.

5. The deed of waiver of Perry did not confer upon him the right of pre-emption, without proof of residence and housekeeping on the land.

6. The court should have decided that the deed of waiver was *found, because of the facts that Perry had no existing unconfirmed claim to waive.

NOELL & BEALL, *for Pl'ff.*

*Void.

Overruled.

But the court refuses to review its finding of facts and conclusions of law, and plaintiff excepts; to all which decisions and opinions the plaintiff objects and excepts, and tenders here to the court this his bill of exceptions, which he prays may be signed, sealed, and made part of the record herein; which is done.

JOHN H. STONE. [SEAL.]

And at the same term, being the fifteenth day of May, 1858, the following order was made in said cause, to wit:

Bond filed and appeal granted.

Now at this day comes the plaintiff, by his attorney, and filed his appeal bond, and prayed an appeal from the decision and determination of the court in this cause to the Supreme Court, which is granted.

STATE OF MISSOURI,
Washington County, ss.

I, the undersigned, clerk of the circuit court in and for the county aforesaid, hereby certify that the foregoing eighty-six pages contains a true and perfect transcript of all the record and proceedings had in the case of John O'Brien against the heirs of John Perry, deceased, in the circuit court of Washington county, as fully as the same remains of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court, at office in the town of Potosi, this 22d day of June, A. D. 1858.

WM. A. MATTHEWS, *Clerk.*

Assignment of Errors.

Afterwards, in said supreme court, at the October term, 1858, on the 25th day of October, 1858, the appellant appeared, by Jno. W. Noell, attorney, and filed an assignment of errors, which is as follows, to wit:

The plaintiff, appellant, comes and says that in the record and proceedings and judgment of the court below, there is manifest error in this, to wit:

1. The court erred in admitting improper evidence on the part of defendant.
2. The court erred in finding the facts.
3. The court erred in its conclusions of law.
4. The court erred in overruling the application of plaintiff for a review.
5. The court erred in rendering judgment for the defendants and against the plaintiff.
6. The court erred in deciding that plaintiff's pre-emption entry and patent were void.

For these and other errors, apparent upon the record, the plaintiff, appellant, prays the judgment may be reversed.

JNO. W. NOELL,
Att'y for Appellant.

Joinder in Error.

And on the following day the defendants, respondents, appeared

by Mason Frissell and Thos. T. Gantt, their attorneys, and filed a joinder in error, which is as follows, to wit:

And the said respondents come and say that in the record of the proceedings of the circuit court in this cause there is no such error as the said appellants have above thereof supposed in their assignment of errors. And this they are ready to verify. Wherefore they pray that said judgment of the circuit court be affirmed.

FRISSEL & GANTT,
For Respondents.

Afterwards during said term the parties appeared by their attorneys aforesaid, and argued this cause and submitted it to the court for decision.

Judgment.

Afterwards, at the March term of said court, 1859, on the 18th day of June, 1859, the court rendered a judgment in this cause, in words and figures as follows, to wit:

JOHN O'BRIEN, Ap.,
vs.
ELIZA M. PERRY et al., Res.

Now at this day come again the parties herein, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, do consider and adjudge, that the judgment aforesaid, in form aforesaid by said circuit court rendered, be in all things affirmed and stand in full force and effect. And it is further considered and adjudged by the court, that the said respondents recover against said appellant their costs and charges herein expended and have therefor execution.

Opinion.

And at the time of rendering said judgment the court gave a written opinion, which is as follows, to wit:

JOHN O'BRIEN, Aplt.,
vs.
ELIZA M. PERRY et al., Res.

Appeal from the Washington Circuit Court.

We regard this case as falling within the reasoning of that of Perry vs. Ohanlon, 11 Mo., 585. Indeed it is a part of the same transaction. The merits of the controversy are all on the side of the appellees. It is in vain that we seek in the record any reason why, after the claimant under whom the appellees hold had been permitted to prove up his pre-emption and enter the land in suit, as he had a right to do, the officers of the Government should have taken it from him and granted it to the appellant on the same terms on which it had been previously conveyed. The U. States it is clear derived no advantage from the transaction, nor would

their interests have been affected by suffering the first entry to remain.

Relying on the reasoning in the case to which reference has been made, we will only notice some of the objections which have been urged by the appellants against the correctness of the judgment of the court below.

We promise that the validity of the original claim under which the appellees derive title, and the question whether that claim would or would not have been confirmed, is not involved in this controversy, for it may be conceded it would not have been confirmed without affecting the judgment to be given.

The question is, whether it was a claim within the meaning of the 1st section of the act of Congress of March 2, 1833, which was supplemental to the act for the final adjustment of land claims in Missouri, approved July 9th, 1832. If it was a claim under that act, then, as it was relinquished by the claimant in pursuance to the provisions of the 3d section of the last named act, it ceased to be subject to the deposition of the officers of the general government, and the land stood reserved for the benefit of him who made the relinquishment, and it is needless to inquire at this day whether the claim was a good one, for as Congress could give away the land, it could dispose of it on terms.

That this was a claim within the meaning of the 1st sect. of the act of 2d March, 1833, is evident from its face, compared with the words of the law. By this act the commissioners appointed under the act of July 9th, 1832, were authorized to consider, decide, and report upon every claim to a donation of land in the State of Missouri, held by virtue of settlement and cultivation. Now, the claim was for land in pursuance to inhabitation and cultivation made thereon conformably to the laws of the U. States, and was dated on the 3 of October, 1807. Whether the claim embraced the land in controversy, was a question to be determined by the board of commissioners, and as the claimant, in pursuance to law, waived an investigation of that question and all others, and submitted to pay for a pre-emption, and did pay for it, his right thereto could not afterwards be annulled by an act of the officers of the government. This was a compromise between him and the government, and after he had made a relinquishment of his right, and paid the purchase money in pursuance to law, the act could not be revoked. Let it be borne in mind, that the officers of the government in annulling the entry did not base the right to do so on the ground that it had not been made within the time prescribed by law, but because the claimant was not an actual settler. The officers of the U. States had admitted that the pre-emption had been proved up within the time contemplated by law.

From this view of the subject, it is manifest that there can be nothing in the objections, that the claim was not within the 1st

section of the act of July 9, 1832; that it was unsurveyed; that it had been forfeited; was subject to entry and sale, and might have been sold like any other public land. Even if these objections could affect the claim, on what ground can the appellant avail himself of them, as he did not enter the land until after it had been entered and paid for by the claimant?

We do not feel the weight of the objection, that a portion of the claim was confirmed under the act of 26 May, 1824, by the recorder of land titles. If a portion of a tract of land is confirmed by the terms of a general law, for instance a village-lot, under the act of 13 June, 1812, being a portion of a larger tract, the whole of which is claimed, we will suppose, under the 2d section of the act of 3d March, 1807, respecting claims to land in the Territories of Orleans and Louisiana, what is there to prevent a party from prosecuting the remainder of his claim? If Congress will confirm a portion of a claim by one law, and afterwards confirms the rest of it by another law, why should not a party be allowed the benefit of both laws? It has never been considered that a claimant by availing himself of a confirmation of a part of his tract under one law, thereby made an abandonment of the rest of it, so that he could not claim the benefit of a future law confirming it. In this connection, how unreasonable was it that the officers of the government should hold, that because the portion of the tract on which the claimant was settled was confirmed by one law, therefore he was no actual settler on the portion that was not confirmed—thus making two tracts out of one, because they were confirmed by different acts of Congress. But as to the objection that the claimant was not an actual settler on the land, it is clear that the instructions contained in the 2 vol. of the work entitled "Public Land," printed in 1838 by the Senate, pages 749, 750, show that a claimant who relinquished his claim was entitled to a pre-emption under the act of 9 July, 1832, although he was not an actual settler. This is the correct interpretation of the act, independently of any instructions, as is obvious from its language.

We do not regard this case as falling within the influence of the principle, that where a patent for land is issued by the officers of the United States, the presumption is that it is valid, and passes the legal title. This is well settled law. But the very case on which reliance is placed to support it, (Minter vs. Crommelin, 18 How., 87,) gives the qualification of the rule, and maintains that this presumption may be rebutted, by showing that the land is not subject to entry and grant. This case is clearly within the qualification of the principle, and presents the question, whether, if one has a claim, and the law proposes to him that if he will relinquish it, he shall be entitled to a pre-emption on the land claimed, and he accepts the proposition, and afterwards the pre-emption is allowed and the land entered, whether that entry can be cancelled.

In such case, would not the bare relinquishment of the claim place the land beyond the control of the officers of the government so long as the claimant was ready and willing to comply with the terms of the compromise?

It has been before observed, that it was not considered material whether the claim had been reserved or not from sale by any act of Congress, as we deemed it sufficient if it was a claim at the date of the act of 2 March, 1833. But in making this concession, we did not intend to admit that the claim was of so little merit, that it had never received so much consideration from the government as to be reserved from sale. The act of Congress of March 3, 1811, sec. 10, reserved all tracts of land, the claim to which had been duly presented to the recorder of land titles; and the act of 17 Feb'y, 1818, establishing additional land offices in the Territory of Missouri, continued this reservation. In pursuance to instructions framed under this act by the Secretary of the Treasury, the claim in this case was marked as reserved from sale on the books of the register and receiver at Jackson, in this State.

Affirmed. WILLIAM SCOTT.

Judge Napton concurring. Judge Richardson gave no opinion.

Bond on Writ Error to U. States Sup. Court.

Afterwards, on the twenty-second day of October, a bond was filed, which is in words and figures as follows, to wit:

Know all men by these presents, that we, Andrew O'Brien and Daniel O'Brien, are held and firmly bound unto Eliza M. Perry, Edward Bredell, Angeline C. Bredell, Stephen T. Dunklin, Rachael E. Dunklin, Sarah A. Perry, John Wiatt, William E. Brown, Robert H. Browne and Joseph T. Browne, infants, and William M. Small, in the full and just sum of five hundred dollars, to be paid to the said Perry, Bredell, Bredell, Dunklin, Dunklin, Perry, Wiatt, Brown, Browne, Browne and Small, heirs, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-second day of October, in the year of our Lord one thousand eight hundred and fifty-nine.

Whereas lately, at the March term, 1859, of the supreme court of the State of Missouri, in a suit depending in said court, between John O'Brien, plaintiff, and Eliza M. Perry, Edward Bredell, Angeline C. Bredell, Stephen T. Dunklin, Rachael E. Dunklin, Sarah A. Perry, John Wiatt, William E. Brown, Robert H. Browne and Joseph T. Browne, infants, and William M. Small, defendants, judgment was rendered against the said John O'Brien, plaintiff, and the said John O'Brien, plaintiff, having obtained a writ of error of the said court to reverse the judgment in the afore-

ment suit, and a citation directed to the said Eliza M. Perry, Edward Bredell, Angeline C. Bredell, Stephen T. Dunklin, Rachael E. Dunklin, Sarah A. Perry, John Wiatt, William E. Brown, Robert H. Browne and Joseph T. Browne, infants, and William M. Small, defendants, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next: Now, the condition of the above obligation is such, that if the said John O'Brien shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

ANDREW O'BRIEN, [SEAL.]
DANIEL O'BRIEN. [SEAL.]

Approved by William B. Napton, presiding judge, within and for the State of Missouri, this twenty-second day of October, in the year 1859.

W. B. NAPTON.

THE STATE OF MISSOURI, *ss.*

I, William S. Glanville, clerk of the supreme court within and for the State aforesaid, held at St. Louis, hereby certify that the foregoing is a full, true, and complete transcript of the record and proceedings of said supreme court, in the case of John O'Brien, plaintiff, and Eliza M. Perry, Edward Bredell, Angeline C. Bredell, Stephen T. Dunklin, Rachael E. Dunklin, Sarah A. Perry, John Wiatt, William E. Brown, Robert H. Browne and Joseph T. Browne, infants, and William M. Small, defendants, as fully as the same remain of record and on file in my office.

In testimony whereof I hereto set my hand and the seal of said [L. S.] supreme court, at office, in Saint Louis, this fourteenth day of November, in the year one thousand eight hundred and fifty-nine.

WM. S. GLANVILLE, *Clerk.*

This transcript, with plat.....	$42 35
Certif. to transcript and writ error, 1 00; filing bond, 10.....	1 10
	$43 45

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the Honorable the Judges of the Supreme Court of the State of Missouri, greeting:

[L. S.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the March term, 1859, between John O'Brien, plaintiff and appellant, and Eliza M. Perry, Edward Bredell, Angeline

C. Bredell, Stephen T. Dunklin, Rachael E. Dunklin, Sarah A. Perry, John Wiatt, William E. Brown, Robert H. Browne and Joseph T. Browne, infants, and William M. Small, defendants, a manifest error hath happened, to the great damage of the said John O'Brien, plaintiff, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court, this twenty-second day of October, in the year of our Lord one thousand eight hundred and fifty-nine.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the district of Missouri, dated as aforesaid.

BEN. F. HICKMAN,
Clerk C. C. U. S., Missouri district.

Allowed by William B. Napton, presiding judge of the supreme court of the State of Missouri, this 22d day of October, in the year 1859.

W. B. NAPTON.

THE STATE OF MISSOURI, *ss.*

I, William S. Glanville, clerk of the supreme court within and for the State aforesaid, held at Saint Louis, in obedience to the command of the within writ, herewith forward to the Supreme Court of the United States a full, true, and complete transcript of the record and proceedings in the case of John O'Brien, plaintiff, and Eliza M. Perry and others, defendants, as fully as the same now remain of record and on file in my office.

In testimony whereof I hereto set my hand and the seal of said court, at office, in Saint Louis, this fourteenth day of November, in the year eighteen hundred and fifty-nine.
[L. S.]

WM. S. GLANVILLE, *Clerk.*

Citation.

The United States of America to Eliza M. Perry, Edward Bredell, Angeline C. Bredell, Stephen T. Dunklin, Rachael E. Dunklin, Sarah A. Perry, John Wiatt, William E. Brown, Robert H.

Browne and Joseph T. Browne, infants, and William M. Small, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Missouri, wherein John O'Brien is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Napton, presiding judge of the supreme court within and for the State of Missouri, this 22d day of October, in the year of our Lord one thousand eight hundred and fifty-nine.

W. B. NAPTON.

In behalf of the defendants in error, the service of the within citation is acknowledged.

St. Louis, October 28th, 1859.

THOS. T. GANTT,
For Def'ts in Error.

Filed 22d March, 1860.

1199

JOHN O'BRIEN, Plaintiff in Error,
vs.
ELIZA M. PERRY, *et al.*
} Error to the Supreme Court of Missouri.

JOHN W. NOELL, for plaintiff in error, submits the following points and authorities:

I. John Perry, under whom defendants claim, never was in a condition to claim as a pre-emptor under the act of July 9th, 1832, not being a *housekeeper residing on the land, and not having an unconfirmed claim.* It is admitted he was not a housekeeper residing on the land, and the proof shows that his claim under Basil Valle was a *confirmed*, not an "*unconfirmed*" claim.

On this point, see the act of July 9th, 1832.

II. There was no proof that the land embraced in Perry's claim was ever reserved from sale. The report of the Register and Receiver is no legal proof of the fact. The statement of the Register and Receiver on that point will be found at page 18 of printed record; and this statement is all the evidence on the point, and was, we think, improperly admitted.

III. The proof of pre-emption, certificate of entry, and patent of the plaintiff, made out a clear legal title, upon which he ought to have recovered. And in order to overcome this proof, the defence undertook to show that the entry and patent were void. This was attempted on two grounds. First, that Perry was a pre-emptor, and entitled to enter the land under the act of July 9th, 1832; and, second, that if he was not so entitled, still the land was reserved from sale, and therefore the plaintiff's entry was void. I have already assumed that Perry's claim was not embraced in the act of July 9th, 1832, because not an *unconfirmed* claim, and because he was not a *housekeeper residing on the land.*

IV. Was the land reserved from sale at the time of O'Brien's entry? Can we go behind the patent to ascertain whether or not the requirements of law to restore it to market have been complied with?

We submit that the land was not reserved from sale. Perry's claim under Basil Valle was confirmed by Recorder Hunt, under the act of 26th May, 1824, the 4th section of which embraced the village of Mine-a-Burton. See 4th Statute at Large, page 65; see printed record, page 30, et seq.

The act of July 9th, 1832, (see section 3,) expressly provides that the lands embraced in the 2d class shall be subject to sale as other public lands; those embraced in the 1st class are reserved, and are all that are reserved. Perry, by his attempted release, prevented a classification of his claim; and having failed in his claim for pre-emption, the claim must be considered as rejected by his own act and consent. He cannot abandon and waive his claim, and then contend that it is reserved on account of an abandoned claim. Those claims not classed are not reserved. Those *waived* are not reserved, but repudiated. The reservation, if any, was for Perry. When he abandons, the reservation ceases. Upon this point of waiver we refer to the lucid opinion of the Solicitor of the Land Office, Mr. Hopkins, at page 22 of printed record.

The acts of 1811 and 1818 only reserve from sale lands embraced within certain claims, "*until disposed of by Congress.*" Congress did dispose of Perry's claim by confirming it under the act of 1824, and did dispose of the same claim in the act of July 9th, 1832, by allowing him to waive it for a pre-emption, which he failed to establish.

From May 29th, 1829, until July 9th, 1832, there is found a *hiatus* in these reservations, and but for the act of July 9th, 1832, this condition would have continued. See act 26th May, 1824, and 24th May, 1828, amendatory and to continue in force the first-named act.

Such being the case, the reservation depends entirely on the act of July 9th, 1832, which I think it has been shewn does not reserve a waived or abandoned claim. Delauriere *vs.* Emison, 15 Howard, 525.

In the case of Mills *vs.* Stoddard, 8th Howard, at page 364, this Court, in a case not like this, say the act of 1832 reserved all claims duly filed till the final report of the

Commissioners. That view, however, had reference to claims that still pended as claims, and not to abandoned or waived claims. That opinion implies, however, that after the final report of the Commissioners, acted on by Congress in 1836, the reservations by the act ceased. If so, then the entry in this case, being after the final action of Congress in 1836, was upon land not reserved. A careful examination of the case of Mills *vs.* Stoddard, 8th Howard; Stoddard *vs.* Chambers, 2d Howard; and Delauriere *vs.* Emison, 15th Howard, will show that they were all claims embraced in the Commissioners' report, and were disposed of or sold to third persons *before* the final action of Congress in 1836. Whereas the case at bar is a claim not reported on, but waived and abandoned, and the land was not sold by the United States until after the final action of Congress in 1836.

To sum up on this point, we think it is clear—

1st. That the reservation of private claims from sale under the acts of 1811 and 1818 expired 29th May, 1829; from which time to July 9th, 1832, there were no reservations.

2. That the act of July 9th, 1832, embraced only *unconfirmed* claims; and as Perry's claim under Basil Valle was already confirmed, it was not embraced.

3. That the act of July 9th, 1832, did not reserve from sale an abandoned or waived claim, but only such as were reported in the first class.

4. That the entry in this case being made by plaintiff after the final action of Congress in 1836, cannot be called in question now by reason of any supposed reservation until the final action of Congress.

Upon these propositions we rely upon the terms of the acts of 1811, 1818, 1824, 1828, and 1832, and the supplemental act of March, 1833. Also, upon the cases of Delauriere *vs.* Emison; Mills *vs.* Stoddard; and Stoddard *vs.* Chambers, above referred to.

V. The next main proposition we lay down is, that the patent itself is presumed to be valid. All the prerequisites to its validity are to be presumed, and the contrary cannot be shown by any other means than by proof that it issued contrary to law. If there are any formalities necessary to bring the land to sale after Perry's abandonment, these

SUPREME COURT OF THE UNITED STATES.

No. 188.

THE PRESIDENT AND DIRECTORS OF THE OHIO AND MISSISSIPPI RAILROAD COMPANY, PLAINTIFFS,

vs.

HENRY D. WHEELER.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

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GIDEON, print.

1209

In the Circuit Court United States, Indiana district—May Term, 1860.

Present, Honorable John McLean, associate justice, and Honorable Elisha M. Huntington, district judge.

THE PRESIDENT AND DIRECTORS OF THE OHIO AND MISSI'PPI R. R. Co. vs. HENRY D. WHEELER. } Assumpsit.

Be it remembered, that this case was presented to the consideration of the court on the following pleadings, to wit:

Circuit Court U. S., 7th circuit, Indiana district—Nov. Term, 1859.

INDIANA, *ss.*

The president and directors of the Ohio and Mississippi Railroad Company, a corporation created by the laws of the States of Indiana and Ohio, and having its principle place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio, complain of Henry D. Wheeler, a citizen of the State of Indiana, and say that heretofore, to wit, on the 25th day of October, 1850, at the dis't aforesaid, the said Wheeler, by his subscription in writing of that date, subscribed for fifty shares of the capital stock of the said company, and thereby promised to pay to the plaintiff the sum of fifty dollars for each of said shares, to be paid in such manner, proportions and times, as might be determined by said company, in pursuance of the charter thereof; and defendant then paid two dollars on each of said shares. The pl'ff herewith exhibits a copy of said subscription, whereby the said Wheeler became and was liable to pay to the pl'ff the sum of $2,400 in the manner, proportions and time aforesaid.

And that afterwards, to wit, on the day and year aforesaid, at Cincinnati, to wit, at the district aforesaid, the plaintiff did determine the manner, proportions, and time of payment of said money as follows, to wit:

One instalment,	$3	per share,	to be paid on	15th July, 1850.
"	5	"	"	8th Dec., 1851.
"	5	"	"	5th Dec., 1852.
"	5	"	"	15 Feb., 1854.
"	15	"	"	1st Jan., 1857.
"	15	"	"	5 March, 1859.

Each to be paid at the office of the company at Cincinnati, Ohio. That before each of said times of payment the pl'ff did give sixty

days' previous notice in the "Cincinnati Daily Commercial," a newspaper of general circulation, published in Cincinnati, Ohio, aforesaid, of the amount so demanded on each share, and of the time and place of each payment; and that the defendant neglected to pay the said second sum on each of the said several shares so by him subscribed for ten days after the said several times so determined. By means whereof, the defendant became liable to pay the plaintiff the amount of said calls, to wit, $2,400, with ten per cent. damages thereon, to wit, $240, together $2,640, with interest thereon, in the whole amounting to a large sum, to wit, $4,000, and in consideration thereof, the defendant then and there promised to pay the plaintiff said last mentioned sum of money, on request; but although often requested, the defendant has neglected and refused, and yet neglects and refuses, to pay the plaintiff any part of the said money, to pl'ff's damage $4,000; wherefore the pl'ff sues, &c.

SAM'L JUDAH,
Pl'ff's Attorney.

Copy of Subscription.

"We, whose names are subscribed hereto, do promise to pay to the president and directors of the Ohio and Mississippi Railroad Company the sum of fifty dollars for every share of stock set opposite to our names, respectively, in such manner, proportions, and time as shall be determined by said company, in pursuance of the charter thereof, the 25th day of October, 1850."

Signed by said Henry D. Wheeler, for fifty shares, and by other subscribers.

SAM'L JUDAH,
Pl'ff's Att'y.

In the United States Circuit Court for the district of Indiana—Nov. Term, 1859.

HENRY D. WHEELER ats. THE PRESIDENT AND DIRECTORS OF THE OHIO AND MISSISSIPPI RAILROAD COMPANY.	Assumpsit.

And the said Henry D. Wheeler, in his own proper person, comes and defends, &c., and says that this court ought not to have or take further cognizance of the action aforesaid, because he says that at the time of the commencement of this suit, and ever since, he was and has been a citizen of the State and district of Indiana, and is now such citizen; that the plaintiff before and at the time of the commencement of this action was, and ever since has been,

and now is a citizen of the same State of Indiana, in this, to wit, that then and during all that time, and now, the plaintiff was, has been, and is a body politic and corporate, created, organized, and existing in the same State, under and by virtue of an act of the general assembly of the State of Indiana, entitled "An act to incorporate the Ohio and Mississippi Railroad Company," approved February 14th, 1848, and an act of said general assembly entitled "An act to amend an act to incorporate the Ohio and Mississippi Railroad Company," approved January 15th, 1849; and that, under and by virtue of said acts, the railroad therein mentioned, so far as the same was by said acts contemplated to be situate in the State of Indiana, was long before the commencement of this suit, to wit, on the first day of January, 1856, built and completed, to wit, in the district aforesaid, and has been ever since that time, and now is, used and operated in said district by the plaintiff; and this the said defendant is ready to verify. Wherefore he prays judgment whether this court can or will take further cognizance of the action aforesaid.

(Signed) HENRY D. WHEELER.

STATE OF INDIANA,
Knox County, ss.

Before me, the undersigned, a notary public in and for said county, on this day personally came the above named Henry D. Wheeler, and made oath that the matters set forth in the foregoing plea, signed by him, are true in substance and in fact.

[SEAL.] Witness my hand and notarial seal, this fourteenth day of November, 1859.

HENRY S. CAUTHAN,
Not. Pub.

Cir. Court U. S., Ind. dist.—Nov. Term, 1859.

PRES. &c., OHIO & M. R. R. Co.
vs.
HENRY D. WHEELER.

The plaintiff, for answer to the plea of defendant, says that the same and the matters therein set forth, in the manner and form therein set forth, are not sufficient in law to maintain the def't's said plea, and this, &c.; wherefore plaintiffs pray judgment, &c.

JUDAH, *for Pl'ff.*

HENRY D. WHEELER
ats.
THE PRESIDENT AND DIRECTORS OF THE OHIO AND MISSISSIPPI R. R. Co.

And the said defendant says that the said plea by him above

pleaded, in manner and form as the same is above set forth, is sufficient in law to preclude the said circuit court from taking or further holding jurisdiction of the action aforesaid; wherefore he prays judgment that said court shall not further take or hold cognizance of said action.

MORRISON & McDONALD,
Def't's Att'ys.

And thereupon the judges of the court were opposed in opinion on the following question presented by the said pleadings: "Has this court, on the facts presented by the said pleadings, jurisdiction of this case?" And the judges being so opposed in opinion on the said question, on motion of Mr. Judah for the plaintiff, it was ordered by the court that the said question and the above statement of the pleadings be certified to the Supreme Court of the United States, under the seal of this court, in pursuance of the act of Congress in such case provided.

THE UNITED STATES OF AMERICA,
District of Indiana, ss.

I, Horace Bassett, clerk of said circuit court of the United States, do hereby certify the above and foregoing to be a true and correct copy of a record made on the Order Book of said court, on the 26th day of May, A. D. 1860, and of the papers in the above entitled cause ordered to be made part of said record, as now appears of record and on the files in my office.

In testimony whereof, I have hereunto set my hand
[SEAL.] and affixed the seal of said court, at Indianapolis, this 1st day of June, A. D. 1860.

H. BASSETT, *Cl'k.*
Per JNO. H. REA.

Filed 23d June, 1860.

1213

SUPREME COURT OF THE UNITED STATES.

No. 109.—December Term, 1861.

The President and Directors of the Ohio and Mississippi Railroad Company, Plaintiffs, vs. Henry D. Wheeler, Defendant.	Assumpsit.

This case is brought up from the circuit court of the United States for the district of Indiana, on a certificate of division of opinion between the judges of that court upon the following question, to wit: "Has the court, on the facts presented by the pleadings, jurisdiction of this case?"

The facts may be stated as follows:

This is an action of assumpsit brought in the above named court by the President and Directors of the Ohio and Mississippi Railroad Company against Henry D. Wheeler, a citizen of the State of Indiana, to recover of him the amount due on a subscription of stock in that company, made by him on the 25th of October, A. D. 1850.

The subscription, which was signed by said Wheeler for fifty shares, (and also by others,) is in these words: "We, whose names are subscribed hereto, do promise to pay to the President and Directors of the Ohio and Mississippi Railroad Company the sum of fifty dollars for every share of stock set opposite to our names, respectively, in such manner, proportions, and times as shall be determined by said company, in pursuance to the charter thereof."

This subscription is a literal copy of a form given in the charter of the road, and the corporation was empowered "to call for such portions of the stock subscribed, not exceeding fifteen dollars on each share in any one year, as they might think proper, to be paid at such time and place as they might designate, by giving sixty days' notice, &c." (See sections 5 and 11 of Charter.)

The company was incorporated on the 14th of February, A. D. 1848, by an act of the Legislature of Indiana, with power to construct a railroad across that State from Lawrenceburg, on the Ohio river, to Vincennes, on the Wabash, extending from the latter point westwardly to St. Louis, and from the former eastwardly to Cincinnati. (See Special Acts of 1848, p. 619.)

Geo. S. Gideon, printer, 511 Ninth street, Washington.

The charter, which is declared to be a public act, provides for annual and special meetings of the stockholders, for the annual election of a Board of Directors, giving to them the usual business powers, and to the corporation power to make such by-laws, rules and regulations, as may be necessary or proper, to carry into effect the provisions of the act. (See section 1 of Charter.)

But it prescribes no place where the meetings of the stockholders and directors shall be held, and where the business office and business of the corporation shall be kept and conducted. These are provided for by the by-laws of the company.

On the 15th of March, 1849, the Legislature of Ohio passed an act adopting the act of Indiana, except as to the mode of locating, and changing the location of the road, and the appropriation of land for the use of the road, which were to be done according to the general law of Ohio on that subject.

The company was organized under these charters, at the city of Cincinnati, on the 25th of November, 1850. And, by the by-laws of the company, the business office of the Board of Directors was established at that city, and has ever since been kept there. There is the place where the stockholders hold their meetings; where the Board of Directors is elected; and where the books and records of the company are kept. The declaration avers, that the Board of Directors did determine the manner, proportions, and time of payment of this subscription, and required it to be paid at the Company's Office in Cincinnati, and that sixty days' notice was given of the amount demanded on each share, and of the time and place of payment.

The defendant Wheeler filed a plea in abatement to the jurisdiction of the court, in which he alleges that he is a citizen of Indiana, and "that the plaintiff, before and at the time of the commencement of this action, was, and ever since has been, and now is a citizen of the same State of Indiana, in this, to wit, that then, and during all that time, and now, the plaintiff was, has been, and is a body politic and corporate, created, organized, and existing in the same State, under and by virtue of an act of the General Assembly of the State of Indiana, entitled 'An act to incorporate the Ohio and Mississippi Railroad Company,' approved February 14, 1848; and an act of said General Assembly, entitled 'An act to amend an act to incorporate the Ohio and Mississippi Railroad Company,' approved January 15, 1849; and that, under and by virtue of said acts, the railroad therein mentioned, so far as the same was by said acts contemplated to be situate in the State of Indiana, was long before the commencement of this suit, to wit, on the 1st day of January, 1856, built and completed, to wit, in the district aforesaid, and has been ever since that time, and now now is, used and operated in said district by the plaintiff."

To this plea the plaintiffs demurred. It will be noticed this plea

does not deny the averment in the declaration, that the company was created a corporation by the laws of Ohio as well as of Indiana; nor does it deny the averment, that it has its principal place of business in Cincinnati, Ohio, and that it is a citizen of Ohio, and that the subscription was made payable at the office of the company in Cincinnati; but the plea, in substance, alleges that, because that part of the road which passes through Indiana was constructed under and by virtue of the laws of Indiana, and ever since its completion, the same has been and still is used and operated by said company in said State, under the charter of that State, that therefore the company is a citizen of the State of Indiana, and, as such, cannot sue the defendant in that State in the circuit court of the United States.

There are, as is well known, in the United States, a considerable number of important railroads, which, like the one now in question, runs through two or more or parts of two or more States, by virtue and under the authority of the laws of those States.

If such corporations have a right to sue at all in the courts of the United States, it must be because they are, in contemplation of law, citizens of some one or of all such States. It would be claiming very much for these corporations to insist that they can sue or be sued as a citizen of each of these States. The right of such a corporation to sue as a citizen of a State must, without doubt, be limited to some one of the States through which the road passes.

And this gives rise to the question: What, in such case, is the criterion by which the citizenship of such a corporation shall be determined?

It will be difficult to fix upon any other criterion in such case, except the locality of its principal place of business. The place where it has its principal business office; where its stockholders hold their meetings; where the board of directors have their sessions; where the records of the company are kept; and where the governing power acts and issues its orders, there, if any where, is the habitat, the residence, the citizenship of such a corporation.

This proposition would seem to be fairly inferrable from the doctrine laid down by this court in the cases of Covington Drawbridge Company vs. Shepard et al., 20 How., 231; Louisville, Cincinnati & Charleston Railroad Company vs. Letson, 2 How., 497; and Marshall vs. The Baltimore & Ohio Railroad Company, 16 How., 325.

Upon the strength of these decisions, we claim that, as it is admitted by the pleadings in this case, that the plaintiff is a corporation, created such by the laws of Ohio, and has its principal place of business at Cincinnati, in that State, the defendant is estopped by that admission from denying that the corporation is a citizen of

Ohio, and that this estoppel is founded upon a principle of public convenience.

The case of Marshall vs. The Baltimore & Ohio Railroad Company seems to be precisely in point. There, Marshall, a citizen of Virginia, sued the Baltimore & Ohio Railroad Company in the circuit court of the United States for the district of Maryland. The Baltimore & Ohio road runs through parts of the States of Maryland and Virginia; and, like the present case, that company has its principal business office in one of those States, to wit, at Baltimore, in Maryland, and it uses and operates that part of the road which lies in Virginia precisely as the Ohio & Mississippi Railroad Company uses and operates that part of its road which is in Indiana. And by looking into the laws of Virginia, it will be seen, that the grant to that company by that State is not merely a grant of a right of way, but is a grant of corporate powers, and that the company is made subject to all the provisions of the general railroad laws of Virginia, so far as the same are properly applicable to that road. Among these laws of Virginia are the act passed March 8th, 1827, sess. acts of 1826 –7, p. 77; March 11th, 1837, sess. acts of 1836 –7, p. 101; and March 6th, 1847, sess. acts of 1847 –7, p. 86. (See 6th sec. of this act.)

In the early decisions of this court, a strict construction was given to that clause of the constitution, which confers jurisdiction upon the courts of the United States, by reason of the citizenship of the parties; but the late cases, and especially those named above, have proceeded upon the ground, that this clause was intended to grant a beneficial privilege to the citizens of the United States, and ought, therefore, to be liberally construed.

S. F. VINTON,
Counsel for Plaintiff.

U. S. SUPREME COURT.

THE PRESIDENT AND DIRECTORS OF THE OHIO AND MISSISSIPPI RAILROAD COMPANY,

vs.

HENRY D. WHEELER.

On a division of opinion between the Judges of the Circuit Court of the United States for the Indiana District.

BRIEF OF THE DEFENDANT.

The declaration in this case describes the plaintiffs as "The President and Directors of the Ohio and Mississippi Railroad Company, a corporation created by the laws of the States of Indiana and Ohio, and having its principal place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio."

The defendant pleaded to the jurisdiction as follows:

"And the said Henry D. Wheeler, in his own proper person, comes and defends, &c., and says that this Court ought not to have or take further cognizance of the action aforesaid; because, he says, that at the time of the commencement of this suit, and ever since, he was

and has been a citizen of the State of Indiana, and is now such citizen; that the plaintiff, before and at the time of the commencement of this action, was, and ever since has been, and now is a citizen of the same State of Indiana, in this, to-wit: that then and during all that time, and now, the plaintiff was, has been, and is a body politic and corporate, created, organized, and existing in the same State, under and by virtue of an act of the General Assembly of the State of Indiana, entitled "An act to incorporate the Ohio and Mississippi Railroad Company," approved February 14th, 1848, and an act of said General Assembly, entitled "An act to amend an act to incorporate the Ohio and Mississippi Railroad Company," approved January 15th, 1849; and that under and by virtue of said acts, the railroad therein mentioned, so far as the same was by said acts contemplated to be situate in the State of Indiana, was long before the commencement of this suit, to-wit: on the first day of January, 1856, built and completed, and has been, ever since that time, and now is used and operated in said District by the plaintiff. And this the said defendant is ready to verify. Wherefore he prays judgment, whether this Court can or will take further cognizance of the action aforesaid."

This plea was sworn to.

To the plea the plaintiff filed a general demurrer; and the defendant joined in demurrer.

"And thereupon the Judges of the Court were opposed in opinion on the following question presented by the said pleadings: *Has this Court on the facts presented by said pleadings, jurisdiction of this case?*" And, of course, this is the only question before the Supreme Court, in the cause.

We hardly need to remind the Supreme Court that the question of the jurisdiction of the Federal Courts over cases where corporations are parties, derived from the provision of the Constitution and the Judiciary Act which give these Courts jurisdiction in causes "*between citizens of different States*," has been one of great difficulty and doubt in this Court, and in which the decisions have not been quite uniform. Literally it seems certain that a corporation is no *citizen* at all; and it is only by bringing corporations within the equity and spirit of the rule that they can be brought within the provisions above referred to. And we understand the result of the decisions to be that, for the purposes of jurisdiction, a corporation is a citizen "of

the locality by which it was created," without reference to the citizenship of the natural persons who compose the corporation. 2 How. R. 497. We are not aware that the decisions of this Court have gone any further than as above stated. And, considering the great difficulty the Court has had in arriving at that result, we presume that the doctrine of the citizenship of a corporation will hardly be carried any further—especially, as the Court is not understood to be altogether unanimous in carrying it so far.

As this Court may perhaps, contrary to the strict common law rule touching demurrers to dilatory pleas, look into the averments in the declaration by which jurisdiction is attempted to be given, these averments first claim our attention.

I. The declaration alleges that the plaintiff is "a corporation created by the laws of the States of Indiana and Ohio, having its principal place of business in Cincinnati, in the State of Ohio, a citizen of the State of Ohio."

We submit that these averments do not sufficiently show the plaintiff's citizenship in Ohio, within the meaning of the constitution and acts of Congress on the subject of the jurisdiction of the Federal Courts; and that therefore the declaration itself is bad.

We contend that the averment that the plaintiff is "a corporation created by the laws of the States of Indiana and Ohio," is repugnant as amounting to the allegation of a legal impossibility. For we suppose that as between two States there can be no joint legislation *creating* one and the same corporation—or, indeed, in passing any law. Each State in its legislation must act independently and separately; and its enactments are only binding within its own jurisdiction. If two States pass a similar law on the same subject, the two are not one joint law, such as would *create* a corporation. They might, indeed, perhaps create two distinct corporations having the same name and like powers; but they could not make the two to be the same artificial person. Nor could the States by subsequent acts unite the two corporations so as to give them one identity. Such appears to have been the doctrine of *Mr. Justice Story*, in *Farnum* v. *The Blackstone Canal Co.*, 1 *Sumn.* 47.

The declaration says that the plaintiff was created by the laws of Indiana and Ohio, and yet claims that it is an Ohio corporation. Could the Indiana Legislature contribute anything towards the creation of a corporation "dwelling" in Ohio?

If such action concerning a corporation should be had by two States, can it be said that the corporation was created by *both* the States? Rather, should we not say that the State whose law first took effect created the corporation; and that the other State had, at most, recognized its existence, not created it?

Besides, by the declaration itself, the plaintiff is as much citizen of Indiana as of Ohio; for the averment is that the plaintiff was created by both States. Can it be half a corporation in each State? Can half citizenship give the jurisdiction? Nor does the averment that the "principal *place*" of the business of the corporation is in Ohio help the declaration. We shall attempt to show presently that this averment is mere surplusage. At present we may say that by a public law of which this Court must take judicial notice, this corporation was created to construct and operate a road across the whole width of the State of Indiana. All along that road must therefore be its place of business—more so than any office in Cincinnati could be. The declaration says its principal *place* (not office) of business is in Cincinnati. We conclude therefore that by the declaration, the plaintiff is as much a citizen of Indiana as of Ohio; which, for the purposes of jurisdiction, seems to us to be equivalent to its being a citizen of neither State.

But as no joint legislation of two States can create one identical corporation, this corporation, if created at all, must, within the constitutional sense, have its citizenship, as well as its creation, in one of these States only; and the declaration leaves it uncertain, of which State. We contend that by a public statute of Indiana, as we will hereafter more fully show, Indiana alone created it, and Indiana alone is its dwelling place. It cannot be pretended that the plaintiff is a citizen both of Indiana and Ohio for the purposes of jurisdiction. No natural person can be a citizen of more than one place at the same time. "The supposition that a man can have two domicils would lead to the absurdest consequences." *Abington* v. *North Bridgewater*, 23 *Pick. R.* 170, 177.—*Story on the Conflict of Laws, sec.* 45, *a.* Now, shall we go so far as to give an artificial person, for the purposes of jurisdiction, a privilege which no natural person in the United States can have? If, as the declaration avers, this corporation was created at all by the laws of Indiana, it is, for the purposes of jurisdiction, a citizen of Indiana, as much as if no other State had legislated concerning it; and it therefore can not sue a citizen of Indiana in the Federal Courts of that State. If the ground assumed

in the declaration be tenable, the plaintiff might also sue in the Federal Courts in Ohio, and aver that it was created by the laws of Ohio and Indiana.

We have said that the averment "the principle *place* of business of the plaintiff is in Ohio, cannot save the jurisdiction, and is mere surplusage. That it may help the jurisdiction seems to be hinted in the case of the Lafayette Insurance Co. *v.* French, 18 How. 404. We submit, however, that the hint is but an *obiter dictum.* But be this as it may, the contrary has been often ruled in this Court. Thus in *Marshall* v. *the Balt. & Ohio Railroad Co.*, 16 How. 325, the averment was that the Company was a "body corporate, by an act of the General Assembly of Maryland;" and it was held sufficient. And in *The Covington Drawbridge Co.* v. *Shepherd*, 20 How. 227, the same doctrine is held. So, in *The Phil., Wil. & Balt. R. R. Co.* v. *Quigley*, 21 How. 202, it was held that to aver the Company to be "a body corporate in the State of Maryland, by a law of the General Assembly of Maryland," was sufficient. So in *Covington Drawbridge Co.* v. *Shepherd*, 21 How. 113, the averment that the defendant "is a corporation and citizen of Indiana," was held good. These cases in 20 *and* 21 *How.* must be considered as overruling the dictum above referred to in 18 *How.*, and as settling the rule that the averment of the place of business is unnecessary, and therefore surplusage.

Besides, we believe that in all cases where any importance has been attached to the place of business of a corporation,, the business of the corporation was in its nature local, as in the case of Banks and Insurance and Bridge Companies. But in the case of a Railroad Company, the place of business is all along the line of the road. The road of the plaintiff, in this case, extends from Cincinnati to St. Louis, crossing part of Ohio and the whole breadth of Indiana and Illinois. Is there any sense in saying its "place of business" is Cincinnati? Whatever importance, therefore, may attach to the place of business of a corporation local to a town or city, in reference to the question of jurisdiction, there seems to be no reason in giving it any consequence as touching a railroad company whose principle place of business must be the whole length of the road. *Cessante ratione legis, cessat ipsa lex.*

Nor can the averment that the plaintiff is "a citizen of the State of Ohio," help the declaration. This averment, says Mr. Justice Curtis, "can have no sensible meaning attached to it. 18 *How.* 405.

We conclude, therefore, that the declaration is on its face, bad, as not showing the jurisdiction; and that for this cause, whatever may be thought of our plea, the point in question should be decided in our favor.

II. But, even supposing that the declaration is on its face good, or that in deciding the point in question the Court will not look to the declaration, we insist that the plea to the jurisdiction is good on its face; and that, its averments being confessed by the demurrer, the decision of this Court should be for the defendant.

The plea avers that the defendant, when the suit was commenced was, and still is, a citizen of Indiana; that the plaintiff then was, and still is, a body politic and corporate, created, organized and existing in the State of Indiana, under and by virtue of an act of the General Assembly of the State, entitled "An act to incorporate the Ohio and Mississippi Railroad Company," approved February 14, 1848, and an act of said General Assembly, entitled "An act to amend an act to incorporate the Ohio and Mississippi Railroad Company," approved January 15, 1849; and that under and by virtue of said acts, the railroad therein mentioned, so far as the same was by said acts contemplated to be situated in the State of Indiana. was, long before the commencement of this suit, to-wit., on the first day of January, 1856, built and completed, to-wit., in the District of Indiana aforesaid, and has been ever since that time, and now is, used and operated in said District by the plaintiff." Now, taking these facts to be true, as must be done on demurrer, we do not see how it can be said that the jurisdiction can be maintained. If they are true, the plaintiff must, to say the least, be a citizen of Indiana, so far as the question of jurisdiction is concerned. For the averments are stronger as to that point, than in either of the cases above referred to in 16 *How.* 325 and 21 *How.* 207. In those cases it is only averred that the corporations were created by the laws of the States respectively; here we add the averment that the corporation has built the road in Indiana, anu for a long time—ever since 1856—has used and operated it in that State. And this latter averment, we submit, is equivalent to the language which Mr. Justice Curtis, in 18 *How.* 405, intimates ought to be employed. For surely to say of a corporation that it has built, and uses, and operates a railroad in a State, indicates its existence there, as much as to say its principal place of business is there. Suppose that a Railroad Company is created by the laws

of a particular State, for the purpose of making a railroad there, and does make, use, and operate its railroad there, but has its principal office of business in another State, in which of these States is it, for the purpose of jurisdiction, a citizen? Surely in the State of its cretion, if anywhere.

This plea says that this corporation was created by an act of the Legislature of Indiana, of February 14, 1848. That act is found in the *Special Laws of Indiana of* 1848, p. 619. By the first section of that act, it is provided that it "shall take effect and be in force from and after its passage, and shall be taken to be a *public act*, and construed liberally for the objects therein set forth, *and the regular organization of the corporation under the same, shall be presumed and considered as proven in all Courts of justice.*"

From this section of the plaintiff's charter, the followinc conclusions seem inevitable:

First. That this act is a public act, of which all Courts must, *ex officio*, take notice. *Bac. Ab. Tit. Statutes, F.*—5 *Blackf. R.*, 170.

Second. That the corporation in question was *created* by this statute, on the 14th day of February, 1848; and thereby became from that time an Indiana corporation.

Third. That the "regular organization of the corporation" under said Indiana charter, must, *ex officio*, "be presumed and considered as proven" in this Court. This Court has, in a much weaker case, *ex officio*, taken notice of an Indiana charter, merely because the Indiana constitution makes all the statutes of that State public acts. Covington Drawbridge Co. *v.* Shepherd, 20 How, 231. Indeed it seems that since the Court must officially note this fact, it is probble that in raising our objection to the jurisdiction, no plea at all was necssary; in other words, perhaps on the very face of the declaration, the Court is bound officially to take notice that this is an Indiana corporation, and that therefore the declaration is bad, as not showing jurisdiction. And so this Court has expressly decided, in Covington, &c., Co. *v.* Shepherd, 20 How. 227, 231.

We believe that it is not pretended by the plaintiff that any act of Ohio referring specially to this corporation was ever passed till after said Indiana act took effect. We suppose, indeed, that all the acts of Ohio concerning this corporation were private acts, and that, not being pleaded, they cannot be noticed by this Court. It seems that acts creating private corporations, as this is, are private statutes, unless the Legislature makes them public. 5 *Blackf.* 78—*Gould's Pl.* 56.

But even if the Court will officially notice the Ohio statutes recognizing this corporation, it cannot aid the jurisdiction. For it is clear that these statutes, having all been passed after the Indiana charter took effect, they did not *create* the corporation.

We shall here notice all the Ohio acts of which we have any knowledge, which have recognized the plaintiff as a corporation.

The first of these Ohio acts, is that of March 15, 1849. Certainly it creates no corporation, but merely recognizes the existence of the plaintiff as a corporation created in the State of Indiana. It only says that "the Legislature of Indiana, on the 14th day of February, 1848, passed an act incorporating the Ohio and Mississippi Railroad Company; and "that the corporate powers granted to said Company *by the act of Indiana incorporating the same be recognized.*" Here is evidence in the Ohio law itself, that this is an Indiana corporation.

The only other Ohio act on the subject which we have found, is an act passed Jan. 24, 1851. It authorizes an extension of the road, by the corporation already existing, to the city of Cincinnati. It is true that the third section of this act undertakes to *declare* that the intention of the first section of the act of March 15, 1849, "was to recognize, confirm and adopt the charter of the said Ohio and Mississippi Railroad Company as enacted by the Legislature of the State of Indiana." But so far as the present controversy is concerned, there are two objections to this declaratory act:

First. The Ohio Legislature has no power to pass a declaratory act. To declare "the intention" of a prior law, is a judicial act; and the judicial power of Ohio has always, by her constitution, been vested in her Courts. Her General Assembly has only Legislative power; it may make laws, but cannot afterwards construe them. "It seems to be settled, as the sense of the Courts of justice in this country, that the Legislature can not pass any declaratory law." 1 *Kent's Com.* 456, *note b.*, and authorities there cited.

Second. This Ohio act does not pretend to *create* a corporation. It only "recognizes, confirms, and adopts the charter of said Company as enacted by the Legislature of the State of Indiana." But the point is not, where has the corporation been recognized; but where was it created? It has never been pretended that, touching the question of the jurisdiction of the Federal Courts, a corporation is a citizen of any State except that which *created* it. Indeed, this Court has said, in the case of the *Bank of Augusta* v. *Earle*, that a corporation "must dwell in the place of its *creation*, and cannot mi-

grate to another sovereignty." 13 *Pet. R.* 588. And in *Runyan* v. *Lessee of Coster*, this Court again said: "A corporation can have no legal existence out of the sovereignty by which it was created." 14 *Pet. R.* 129.

We contend, therefore, that if even the Ohio acts on this subject were public acts, officially cognizable by this Court, it does not appear that they have anything to do with the *creation* of this corporation; but that they only recognize it as an existing Indiana corporation, and authorize it, as such, to extend its road to Cincinnati. In no sense can it be pretended that any legislation of Ohio *created* this corporation. That would be an impossibility; for the Ohio Legislature could not *create* a corporation which had already been created by the Legislature of Indiana. And, as the decisions of this Court have gone no farther than to hold that, in the sense of the Constitution and the judiciary act, a corporation is a citizen of the State which created it, and as it is clear, both by the plea in question and by a public statute of Indiana already referred to, that this corporation was *created* by Indiana legislation alone, we presume that this Court will not now go so far as to hold that a mere recognition of this corporation by the laws of Ohio, makes it, for the purposes of jurisdiction, a citizen of Ohio.

But will it be insisted that here are two distinct corporations—one created by the laws of Indiana, the other by the laws of Ohio—for the common purpose of constructing and operating the Ohio and Mississippi Railroad? If so, we reply as follows:

First. This supposition is inconsistent with the averment in the declaration touching the question of jurisdiction. The declaration avers that the plaintiff is "a corporation *created* by the laws of the States of Indiana and Ohio." And we submit that the plaintiff can not now abandon the ground assumed in the declaration that this corporation was created by the joint action of two States, and insist that the plaintiff is a separate corporation created only by Ohio law, and only having the same name as the corporation previously created by Indiana law. If this fact had been put in the form of a replication, such replication would be clearly bad, as a departure from the ground assumed in the declaration.

Second. We deny that either by the declaration, or the laws of Ohio, it appears that any separate corporation was created in that State. The declaration, as we have just shown, avers the contrary of this hypothesis, by charging that the laws of Indiana and Ohio